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Supreme Court, U.S.
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In The

Supreme Court of the United States

SANDRA SHOOK,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1997, the State of Montana, through its Fish, Wildlife and Parks Commission, promulgated a regulation that restricts big game hunting privileges on Indian Reservations to tribal members. Petitioner, Ms. Sandra Shook, a non-tribal member, was charged and convicted of violating the regulation. The questions presented are as follows:

1. Whether a state has the same "trust relationship" with American Indians as does the federal government.

2. Whether a state law that allows tribal members to hunt wildlife within the exterior boundaries of an Indian reservation while denying that same right to non-tribal members who own fee property within those boundaries creates a racial classification that must be subjected to "strict scrutiny" in accordance with this Court's holdings in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

3. Whether a state law that distinguishes between tribal and non-tribal members, where tribal membership is dependent on ancestry, creates a racial classification that must be subjected to "strict scrutiny."

LIST OF PARTIES

Petitioner: Ms. Sandra Shook was Defendant in the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sanders, and Appellant before the Supreme Court of the State of Montana.

Respondent: The State of Montana was Plaintiff in the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sanders, and Respondent before the Supreme Court of the State of Montana.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
REGULATORY PROVISION AT ISSUE	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
I. A DIRECT CONFLICT EXISTS BETWEEN THE DECISION OF THE MONTANA SUPREME COURT AND DECISIONS OF THIS COURT	6
A. THE DECISION OF THE MONTANA SUPREME COURT, THAT MONTANA HAS A DUTY TO FULFILL THE UNIQUE FEDERAL OBLIGATION TOWARD INDIANS, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT	6
B. THE DECISION OF THE MONTANA SUPREME COURT, THAT A STATE REGULATION ESTABLISHING A RACIAL CLASSIFICATION BASED ON TRIBAL MEMBERSHIP IS SUBJECT TO RATIONAL BASIS REVIEW, IS IN DIRECT CONFLICT WITH *CROSON* AND *ADARAND*	11

TABLE OF CONTENTS – Continued

Page

C. THE DECISION OF THE MONTANA SUPREME COURT, THAT A STATE CLASSIFICATION DISTINGUISHING BETWEEN TRIBAL AND NON-TRIBAL MEMBERS IS A POLITICAL CLASSIFICATION SUBJECT TO RATIONAL BASIS REVIEW, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *RICE v. CAYETANO* 16

II. THE DECISION OF THE MONTANA SUPREME COURT, THAT A GOVERNMENTAL PREFERENCE IN FAVOR OF TRIBAL MEMBERS IS SUBJECT TO RATIONAL BASIS REVIEW, IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT* 21

CONCLUSION 24

TABLE OF AUTHORITIES – Continued

Page

CASES

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ..... *passim*

Atkinson Trading Company, Inc. v. Shirley, 532 U.S. 645 (2001) 20, 23

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 7, 8

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989) 12, 14, 15, 16

Metro Broadcasting Inc. v. F.C.C., 497 U.S. 1050 (1990) 12

Montana v. United States, 450 U.S. 544 (1981) 20, 23

Morton v. Mancari, 417 U.S. 535 (1974) ..... *passim*

Rice v. Cayetano, 528 U.S. 495 (2000) 17, 18, 19, 20

Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) 19

State v. Stasso, 563 P.2d 562 (1977) 10

United States v. Antelope, 430 U.S. 641 (1977) 22, 23

United States v. Kagama, 118 U.S. 375 (1886) 8

Unites States v. Sandoval, 231 U.S. 28 (1913) 8

U.S. Air Tour Assoc., et al. v. Federal Aviation Admin., et al., 298 F.3d 997 (D.C. Cir. 2002) 22

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) 8

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) 21, 22, 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

U.S. Const. Art. I, § 8, cl. 3 7

U.S. Const. Art. II, § 2, cl. 2 7

U.S. Const. Art IV, § 3, cl. 2 7

U.S. Const. Amend. XIV, § 1 (Equal Protection) 2, 4, 15, 20

Mont. Const. Art. I (Montana Enabling Act, 25 Stat. 676 (1889)) 9, 15

STATUTES

Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq* 17

Reindeer Act of 1937, 25 U.S.C. § 500, *et seq* 21

Mont. Code Ann. § 87-1-304 (2001) 3, 4

TREATIES

Treaty with the Flatheads, Etc., July 16, 1855 ..... 9, 10

OTHER AUTHORITIES

Benjamin, Stuart M., *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996) 12

Could, L. Scott, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702 (2001) 13

TABLE OF AUTHORITIES – Continued

Page

Farnsworth, Wayne R., Note, *Bureau of Indian Affairs Hiring Preferences After* Adarand Constructors, Inc. v. Peña, 1996 BY.U. L. Rev. 503 (1996).....13

Johnson, Ralph W. and Crystal, E. Susan, *Indians and Equal Protection*, 54 Wash. L. Rev. 587 (1979)..... 7

Shockey, Frank, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari *Contra,* Adarand Constructors, Inc. Peña, Rice v. Cayetano, *and Other Recent Cases*, 25 Am. Indian L. Rev. 275 (2000/2001).....13

PETITION FOR WRIT OF CERTIORARI

Ms. Sandra Shook hereby petitions this Court for a *writ of certiorari* to review the judgment of the Supreme Court of the State of Montana.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana from which review is sought is reported at 313 Mont. 347, ___ P.2d ___ (Mont. 2002) and is reproduced at App. 1. The opinion of the Supreme Court of the State of Montana denying Petitioner's Petition for Rehearing is reported at 2002 MT 347A, 2003 WL 347575 (Mont. 2003) and is reproduced at App. 27. The opinion of the Montana Twentieth Judicial District Court, Sanders County, is reported at 1999 Mont. Law 294 (Mont. 1999) and is reproduced at App. 22.

JURISDICTION

The judgment of the Supreme Court of the State of Montana was entered on December 30, 2002. App. 2. On January 13, 2003, Ms. Shook timely filed a Petition for Rehearing. App. 27. On February 11, 2003, the Supreme Court of the State of Montana denied Ms. Shook's Petition for Rehearing. App. 27. Pursuant to Supreme Court Rule 13.3, this Petition is filed timely within 90 days of the Supreme Court of the State of Montana's denial of Ms. Shook's Petition for Rehearing. Pursuant to 28 U.S.C.

§ 1257(a), this Court has jurisdiction to review the judgment of the Supreme Court of the State of Montana.

CONSTITUTIONAL PROVISION INVOLVED

This Petition involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REGULATORY PROVISION AT ISSUE

In 1997, Montana's Fish, Wildlife, & Parks Commission promulgated its Big Game Hunting Regulations, which provide, in pertinent part, that "[b]ig game hunting privileges on Indian Reservations are limited to tribal members only." App. 32.

STATEMENT OF THE CASE

Ms. Sandra Shook, a non-Indian, owns fee property located within the exterior boundaries of the Flathead Indian Reservation in northwestern Montana. On October 20, 1997, Ms. Shook purchased a Montana resident deer hunting license and tag in accordance with the Montana

Big Game Hunting Regulations. On November 16, 1997, while hunting within the exterior boundaries of the Flathead Indian Reservation on non-Indian fee property owned by a Mr. Robert Rawlins, Ms. Shook shot and tagged a white-tailed deer. Mr. Rawlins had granted Ms. Shook express permission to enter onto and to hunt on his land, which was in accordance with Montana Big Game Hunting Regulations.[1]

On the day that Ms. Shook shot and tagged the white-tailed deer, Montana's Fish and Game Commission charged Ms. Shook with hunting in a closed area in violation of Section 87-1-304 of the Montana Code, which provides the Commission the authority to fix hunting seasons and bag and possession limits. App. 3. The non-Indian fee property on which Ms. Shook was hunting was deemed a "closed area" under a 1997 Montana Big Game Hunting Regulation that restricts big game hunting privileges within the exterior boundaries of Indian reservations to tribal members.[2] App. 32. This regulation is applicable to all Indian reservations within the State of Montana.

Ms. Shook appeared before the Sanders County Justice Court of Montana and entered a guilty plea to the

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[1] The 1997 Montana Big Game Hunting Regulations provide that hunters must have permission of the landowner, lessee, or his agent before hunting big game animals, including deer, on private property, regardless of whether the land is posted. App. 32.

[2] The 1997 Montana Big Game Hunting Regulation limiting big game hunting privileges on Indian Reservations to tribal members only remains valid and current under the 2003 Montana Hunting Regulations for Deer, Elk, and Antelope. App. 33.

offense of "violating rules and regulations of the Montana Fish and Game Commission," a misdemeanor, in violation of MCA § 87-1-304. App. 3. Ms. Shook reserved her right to a review of the adverse determination and filed a Notice of Appeal. App. 3. The matter was then presented for review to the Montana Twentieth Judicial District Court of Sanders County. App. 3. Ms. Shook filed a Motion to Dismiss challenging the authority of the Montana Fish and Game Commission to designate private property within the Flathead Indian Reservation as "closed" to hunting by non-tribal members. App. 23. Ms. Shook alleged, *inter alia*, that the regulation restricting big game hunting privileges on Indian reservations to only tribal members establishes a racial preference in violation of the Fourteenth Amendment to the United States Constitution. App. 23. The District Court denied Ms. Shook's Motion to Dismiss and found her guilty of the charged violation. App. 26. In ruling that the regulation did not violate the equal protection guarantee of the Fourteenth Amendment, the District Court held that it must adhere to federal court precedents that suggest that distinctions between Indians and non-Indians are based upon political classifications and not racial classifications. App. 23.

Ms. Shook subsequently pleaded guilty, admitting to killing a buck white-tail deer on non-Indian private property within the exterior boundaries of the Flathead Indian Reservation, while reserving her right to appeal. App. 17. Ms. Shook was sentenced to five days in the Sanders County Jail, which was suspended, ordered to pay a fine in the amount of $500.00, and ordered to forfeit all privileges to hunt in the State of Montana for a period of twenty-four months from the date of conviction. App. 18.

Ms. Shook then appealed the District Court's ruling to the Montana State Supreme Court.

On appeal, Ms. Shook again argued, *inter alia*, that the 1997 Big Game Hunting Regulation was unconstitutional under state and federal law. App. 5. Specifically, Ms. Shook asserted that the plain language of the regulation violates the Equal Protection Clause because it distinguishes between Indians and non-Indians on the basis of race. App. 5. Ms. Shook further argued that the regulation was an unlawful exercise of the powers of the Montana Fish and Game Commission. App. 10. The Montana State Supreme Court affirmed the District Court's ruling that the regulation closing all land within Indian reservations to big game hunting by non-tribal members was constitutional. App. 6. The Montana Supreme Court based its holding on this Court's ruling in *Morton v. Mancari*, 417 U.S. 535 (1974). App. 6. The Montana State Supreme Court held that the regulation, which distinguishes between persons based on tribal membership, was constitutional under equal protection requirements because the distinction is political rather than racial. App. 6. Consequently, the Montana State Supreme Court did not apply strict scrutiny, but decided instead that it need only address whether the regulation is tied rationally to the fulfillment of federal and state obligations toward Indians. App. 8. In doing so, the Montana Supreme Court determined that there was a rational basis for the challenged regulation and, thus, held that the 1997 Big Game Hunting Regulation did not deprive Ms. Shook of equal protection under the laws of the United States. App. 8.

REASONS FOR GRANTING THE PETITION

I. A DIRECT CONFLICT EXISTS BETWEEN THE DECISION OF THE MONTANA SUPREME COURT AND DECISIONS OF THIS COURT.

A. THE DECISION OF THE MONTANA SUPREME COURT, THAT MONTANA HAS A DUTY TO FULFILL THE UNIQUE FEDERAL OBLIGATION TOWARD INDIANS, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

In upholding Ms. Shook's conviction the Montana Supreme Court ruled:

> The State of Montana is required to follow [the fulfillment of the unique federal obligation toward Indians] by the express terms of both our own Constitution and the federal enabling act establishing Montana as a state. Specifically, following the Preamble to the Montana Constitution, Article I, the Compact With the United States, requires that the State abide by 'the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States.'

App. 7. The Montana Supreme Court also ruled that "Indian treaties are 'regarded as a part of the law of the state as much as the state's own laws and Constitution[,] [are] effective and binding on [the] state legislature[ ] . . . [and are] superior to the reserved powers of the state, including the police power.'" App. 7. Without any additional explanation, the Court reasoned that, "[c]onsequently, federal Indian law regarding the rights of Indians is binding on the state[ ]" and therefore Montana's regulation differentiating between

similarly situated persons based on tribal membership is essential to "the fulfillment of the unique federal, and consequently state, obligation toward Indians." App. 7.

The Montana Supreme Court's interpretation of the Montana Constitution, together with its holding regarding the application of Indian Treaties, is erroneous and results in the creation of a *de facto* trust relationship between Montana and the several Indian tribes within its borders. States do not have the same trust relationship with American Indians as does the federal government. Thus the equal protection analysis applied to state action differs significantly from that applied to federal legislation. *See*, Ralph W. Johnson and E. Susan Crystal, *Indians and Equal Protection*, 54 Wash. L. Rev. 587, 609 (1979).

The U.S. Constitution does not contain an explicit delineation of a trust relationship between the federal government and Indians, but it does grant powers to the federal government that have been held to authorize its role as a trustee. Most notably is the congressional power to regulate commerce with the Indian tribes, Art. I, § 8, cl. 3, and the presidential power to make treaties, Art. II, § 2, cl. 2. Additional support may be found in the congressional power to make regulations governing the territory belonging to the United States, Art IV, § 3, cl. 2. Based upon these provisions, this Court's first recognition of a trust relationship between the federal government and American Indians came with Chief Justice John Marshall's decision in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

Justice Marshall characterized Indian tribes as "domestic dependent nations" with a relation to the United States that "resembles that of a ward to his guardian."

Cherokee, 30 U.S. at 17. Fifty years later, this Court further evolved this relationship in upholding Congress's Major Crimes Act, which defined certain offenses committed by Indians as federal crimes:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States, [ ] dependent for their political rights. *They owe no allegiance to the states, and receive from them no protection.* [ ] From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by [C]ongress, and by this [C]ourt, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 384-385 (1886) (emphasis added); *see also*, *United States v. Sandoval*, 231 U.S. 28, 45-48 (1913) (The power to enact laws for the benefit and protection of Indian tribes rests with Congress). These decisions and their progeny set forth a clear distinction between American Indians' relationship with the federal government and their relationship with the separate states. More recently, in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, this Court again acknowledged that "[s]tates do not enjoy [the] same unique relationship with Indians" as does the federal government so that only Congress may enact legislation, "singling out tribal Indians." 439 U.S. 463, 501 (1979). Thus, although this Court has held that the federal government has a special "trust relationship" with Indian tribes, this Court has never reached that conclusion regarding the states.

Nor is any authority for such a relationship to be found in Montana's Constitution. Article I of the Montana Constitution, on which the Montana Supreme Court relied, does not provide Montana with the authority to fulfill the "unique federal obligation toward Indians."[3] App. 30. Moreover, it does not recognize a unique state obligation to the Indians that might create a trust relationship. App. 30. Article I of the Montana Constitution provides only that those lands held by Indians or Indian tribes remain under the "jurisdiction and control" of the United States. App. 30. This provision does not establish or mandate that Montana fulfill any unique obligation, state or federal, toward Indians. Furthermore, it demonstrates that any trust relationship with or obligation toward Indians is exclusively federal.

Nor do Indian treaties, specifically the Treaty with the Flatheads, provide Montana authority for entering into the same unique relationship with Indians into which the federal government has entered as a result of the U.S. Constitution and numerous treaties between the federal government and various tribes. App. 34. The Flathead Treaty, concluded at Hell Gate in the Bitter Root Valley of Montana on July 16, 1855, was ratified by the Senate on March 8, 1859, and signed by the President of the United States, James Buchanan, that same year. App. 35. Montana did not join the Union as the 41st state until 1889, well after the Flathead Treaty. Thus, the Flathead Treaty did not establish, nor could it even have contemplated, a

[3] Implicitly, because the "federal obligation toward Indians" is "unique," it may not be shared with the States.

trust relationship between the State of Montana and the several Indian tribes involved.

Moreover, the language of the Treaty does not provide the several Indian tribes with the exclusive right to hunt on all lands within the exterior boundaries of the reservation; hunting privileges were granted to all citizens of the Montana Territory:

> The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, *in common with citizens of the Territory*, and of erecting temporary buildings for curing; *together with the privilege of hunting*, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Flathead Treaty, Article III (emphasis added). App. 34-35. The language of the Treaty is clear and unambiguous. The only exclusive right reserved to the tribes is that of "taking fish in all the streams running through or bordering said reservation[.]" The privilege of the tribes to hunt within the exterior boundaries of the reservation is not exclusive. Instead the privilege of hunting reserved to the Indians is limited to land that is open and unclaimed; that is, lands not owned and occupied by private parties "under possessory rights or patent or otherwise appropriated to private ownership." *State v. Stasso*, 172 Mont. 242, 248, 563 P.2d 562, 565 (1977). Thus, although the Treaty does establish that Indians do reserve some hunting privileges within the reservation, those privileges are not exclusive.

As the foregoing demonstrates, neither the U.S. Constitution, nor the Montana Constitution, nor the Flathead Treaty establish a trust relationship between Montana and

American Indians so as to permit Montana to enact laws "singling out tribal Indians" in an unconstitutional manner. The Montana Supreme Court's creation of a *de facto* trust relationship between Montana and the several Indian tribes within its borders conflicts with the U.S. Constitution and the decisions of this Court. For these reasons this Petition should be granted.

B. THE DECISION OF THE MONTANA SUPREME COURT, THAT A STATE REGULATION ESTABLISHING A RACIAL CLASSIFICATION BASED ON TRIBAL MEMBERSHIP IS SUBJECT TO A RATIONAL BASIS REVIEW, IS IN DIRECT CONFLICT WITH *CROSON* AND *ADARAND*.

The Montana Supreme Court applied the rational basis standard of review to the challenged state hunting regulation:

> [W]e need only address whether the state regulation that prohibits non-tribal members from hunting big game on Indian reservations is rationally tied to the fulfillment of [Montana's] unique obligation toward Indians.

App. 8. The Montana Supreme Court applied this standard after determining that "federal Indian law regarding the rights of Indians is binding on the state[,]" and thus, the state must defer to this Court's decision in *Mancari*. App. 7. Adopting the reasoning of *Mancari*, the Montana Supreme Court held that Montana's classifications, based on tribal membership, are "constitutional under equal protection requirements because the distinction is political rather than racial[ ]" and that the classifications can then

be tied rationally to the "fulfillment of the unique obligation toward Indians." App. 6 (citing *Mancari*, 417 U.S. at 552-54). The ruling of the Montana Supreme Court is in conflict with decisions of this Court.

It is well established that when a state treats similarly situated persons differently because of their race, strict scrutiny must be applied. *See*, *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). In *Croson*, this Court held that racial preferences created by a state are subject to a heightened or strict level of scrutiny, which requires a demonstration of a compelling governmental interest, which is served by a narrowly tailored remedy. 488 U.S. at 492-97. In *Adarand*, this Court held that racial preferences, including those granted to Native Americans, must be analyzed under "strict scrutiny." 515 U.S. at 227. Furthermore, this Court held that all racial classifications imposed by any "governmental actor," including federal, state, or local, must be analyzed under "strict scrutiny." *Id.* In addition, *Adarand* expressly overruled *Metro Broadcasting Inc. v. F.C.C.*, 497 U.S. 1050 (1990), in part because its application of intermediate scrutiny to federal racial classifications was inconsistent with the "strict scrutiny" applied to state classifications compelled by the equal protection guarantee.[4] *Id.* at 233-35.

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[4] There is considerable debate among commentators as to the extent that governmental agencies may discriminate in favor of Native Americans: Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996) (recognizing that *Adarand* creates an uneasy relationship between the special relationship of Congress and Indian tribes recognized in *Morton v. Mancari* and the frustration with racial classifications in *Adarand*);

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Montana's regulation burdens non-tribal members and thus represents a racial classification. That is, Montana bars hunting within the exterior boundaries of the Flathead Indian Reservation by a non-tribal member who seeks to hunt on non-Indian fee property that she owns or that is owned by another non-Indian. Because membership for each one of the eleven Indian tribes that reside on reservations in Montana requires a certain blood quantum, it is impossible for a non-Indian, that is, a person without the requisite degree of American Indian blood, to simply "apply" for and be granted membership with a tribe.[5] Consequently, to be recognized as a tribal member, a person must be classified as an American Indian, a racial classification expressly acknowledged by this Court. Therefore, because the challenged Montana's Big Game Hunting

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L. Scott Could, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 718 (2001) (*Mancari's* overlay of race with status permits preferences that would not survive strict scrutiny under *Adarand*.); Frank Shockey, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari *Contra*, Adarand Constructors, Inc. v. Peña, Rice v. Cayetano, *and Other Recent Cases*, 25 Am. Indian L. Rev. 275 (2000/2001); Wayne R. Farnsworth, Note, *Bureau of Indian Affairs Hiring Preferences After* Adarand Constructors, Inc. v. Peña, 1996 B.Y.U. L. Rev. 503 (1996).

[5] The degree of blood quantum required for each tribe may be referenced through their respective constitutions and bylaws: Blackfeet Constitution & Bylaws, http://www.tribalresourcecenter.org/ccfolder/blackfeet_constandbylaws.htm; Crow Tribal Constitution, http://www.tribalresourcecenter.org/ccfolder/crow_const.htm; Salish and Kootenai Constitution and Bylaws, http://www.tribalresourcecenter.org/ccfolder/salishandkootenai_constandbylaws.htm; Fort Peck Comprehensive Code of Justice 2000, http://www.ftpeckcourts.org/CCOJ/Title004.htm; Constitution of the Fort Belknap Indian Community, www.tribalresource center.org/ccfolder/fort_belknap_const.htm; Northern Cheyenne Tribe Constitution and Bylaws, http://www.mt.blm.gov/mcfo/cbm/eis/NCheyenne NarrativeReport/AppB.pdf.

Regulation establishes a racial classification, it must be subject to "strict scrutiny" under this Court's decisions in *Croson* and *Adarand*.

This conclusion is supported by the fact that *Croson* spoke expressly to the very limited authority of States to make racial distinctions, for whatever purpose:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions.

Croson, 488 U.S. at 490 (emphasis in original). Montana, however, does not assert that it is seeking to remediate past wrongs, only that is fulfilling its purported "unique obligation toward Indians." App. 8. Indeed, the Montana Supreme Court held that Montana and its Fish & Game Commission both "[have] a duty to regulate hunting by non-tribal members in a way that recognizes the Indian hunting privileges protected by federal law."[6] App. 8. In

[6] Montana may "recognize[ ] the Indian hunting privileges protected by federal law[ ]" without making the unconstitutional racial distinction utilized by the Montana hunting regulation challenged here. Indeed, the Montana Supreme Court expressly acknowledged that "there may be other means to conserve the big game wildlife" and regulate hunting by non-tribal members, notwithstanding the discriminating effects

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support of its holding, the Montana Supreme Court pointed to Article I of the Montana Constitution, which incorporates all provisions of the enabling act of Congress approved February 22, 1889, including:

> [T]he agreement and declaration that all lands owned or held by any Indian of Indian tribes shall remain under the absolute jurisdiction and control of the Congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

App. 7. According to the Montana Supreme Court, this provision gives Montana the authority to fulfill the unique federal obligation towards Indians. App. 7. The Montana State Enabling Act, however, does not afford Montana this unconstitutional power. The Enabling Act merely asserts that Indian tribal land is to remain under the jurisdiction of the United States, not the State of Montana. To hold otherwise conflicts directly with this Court's decision in *Croson* that the states do not possess the powers Congress enjoys under the Fourteenth Amendment where a racial classification is at issue. Unlike Congress, Montana has no constitutional obligation to advance the interests of American Indians as opposed to the interests of all its other citizens. Furthermore, as demonstrated above, Montana has no special trust relationship with American Indians that permits it to escape the standard of review compelled by *Croson* and *Adarand*.

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of the challenged regulation. App. 9. However, because the Montana Supreme Court erroneously applied a rational basis test, it has allowed an unconstitutional racial distinction to permeate Montana law.

Accordingly, strict scrutiny should have been applied by the Montana Supreme Court to the challenged Montana regulation. The Montana Supreme Court's failure to do so is in conflict with this Court's decisions in *Adarand* and *Croson*. As a result, this Petition should be granted.

C. THE DECISION OF THE MONTANA SUPREME COURT, THAT A STATE CLASSIFICATION DISTINGUISHING BETWEEN TRIBAL AND NON-TRIBAL MEMBERS IS A POLITICAL CLASSIFICATION SUBJECT TO RATIONAL BASIS SCRUTINY, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *RICE v. CAYETANO*.

The Montana Supreme Court relied on this Court's decision in *Mancari* in holding that "laws that distinguish between persons based on tribal membership have long been held constitutional under equal protection requirements because the distinction is political rather racial." App. 6 (citing *Mancari*, 417 U.S. at 552-54). The Montana Supreme Court further held that "laws that afford Indians special treatment are constitutional as long as those laws can be tied rationally to the fulfillment of the unique federal obligation towards Indians." App. 6. Concluding that the Montana Big Game Hunting Regulation barring non-tribal members from hunting upon private land within the exterior boundaries of a reservation creates a political, not racial, classification, the Montana Supreme Court found that the regulation was tied rationally to the "unique federal, and consequently state, obligation toward Indians." App. 7. The Montana Supreme Court's decision is in direct conflict with decisions of this Court limiting the

applicability of *Mancari* and applying strict scrutiny to all racial classifications, including American Indians.

Mancari was the first time in which this Court was confronted with an equal protection challenge to a law benefiting American Indians. In *Mancari*, this Court upheld legislation adopted by Congress that accords an employment preference for qualified Indians in the Bureau of Indian Affairs ("BIA") because the preference served the federal government's goal of promoting Indian self-government.[7] 417 U.S. at 541. To qualify for the employment preference, Indians were required to be members of a federally recognized tribe and possess one-fourth or more degree Indian blood. *Id.* at 553, n. 24. This Court held that "[t]he preference, as applied, [was] granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. However, this Court expressly noted that the decision in *Mancari* was confined solely to the employment of Indians in the BIA, an agency described as "*sui generis*." *Id.*

The limited reach of *Mancari* was recognized by this Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), wherein this Court addressed whether ancestry can be a proxy for race in determining racial classifications for equal protection grounds. In that case, a citizen of Hawaii brought an equal protection claim against state officials challenging a requirement that voting for trustees for the Office of Hawaiian Affairs was limited to those persons

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[7] Specifically, the BIA was acting pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq*.

whose ancestry qualified them as either "Hawaiian" or "native Hawaiian." *Id.* at 499. Finding the voting requirement in violation of the Fifteenth Amendment, this Court held that the state, by using ancestry as a proxy for race, had created a race-based voting qualification. *Id.* at 514-15. Furthermore, this Court held "[t]o extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs." *Id.* at 522.

As in *Cayetano*, the challenged Montana hunting regulation uses ancestry as a proxy for race. To be able to hunt within the exterior boundaries of a reservation, even on non-Indian fee property, a person must be a tribal member. App. 32. To be a member of one of the eleven tribes and, thus to be able to hunt within the boundaries of one of the seven reservations in Montana, including the Flathead Indian Reservation, a person must possess at least a one-fourth blood quantum.[8] This requirement establishes a clear racial classification and racial purpose. Nonetheless, the Montana Supreme Court concluded:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

App. 6 (quoting *Mancari*, 417 U.S. at 553-54). This Court rejected in *Cayetano* the very basis asserted by the Montana

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[8] See *supra*, note 4.

Supreme Court that "[Montana's] preference is political rather than racial." 528 U.S. at 520-21. This Court held that Hawaii's legislation limiting voting rights to persons of defined ancestry "used ancestry as a racial definition and for a racial purpose." *Id.* at 515. This Court further recognized that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Id.* at 516. Moreover, "'racial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

Furthermore, in declining an invitation to extend *Mancari* to a new and larger dimension, this Court in *Cayetano* explained that *Mancari* turned on quasi-sovereign authority relating to self-governance, which caused this Court to uphold "a federal provision giving employment preferences to persons of tribal ancestry." *Id.* at 518 (citing *Mancari*, 417 U.S. at 553-55). Distinguishing the facts of *Mancari* from those before it, this Court declared that the legislative preference in *Mancari* was "'designed to further Indian self-government.'" *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555). As was the case in *Cayetano*, the Montana regulation at issue here does not relate to Indian self-governance.

Indeed, in order for the Montana Supreme Court to apply the *Mancari* rational basis test it was necessary for it to assume that Montana had the same "*sui generis*" relationship with Indian tribes as the BIA. But, Montana does not have the established trust relationship with the Indians as exists between the federal government and American Indians. Moreover, the ability of Ms. Shook to

hunt within the exterior boundaries of the Flathead Reservation on non-Indian fee property does not interfere with any tribal regulation or established treaty. In fact, this Court has already determined that tribal jurisdiction regarding hunting rights does not extend to non-Indian fee property within the exterior boundaries of a reservation. *See, Montana v. United States*, 450 U.S. 544 (1981). Further, "hunting [ ] on non-Indian fee land [does] not 'imperil the subsistence or welfare of [a] [t]ribe[,]'" nor threaten the political or economic security of a tribe. *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 651 (2001); *see also, Montana*, 450 U.S. at 564-66.

Because, under *Cayetano*, the Montana hunting regulation is subject to strict scrutiny, the Montana Supreme Court erred when it applied a rational basis test. As this Court held in *Adarand*, all racial classifications, including those that affect American Indians, imposed by any government, federal or state, must be analyzed under strict scrutiny. 515 U.S. at 227. The Fourteenth Amendment "protect[s] persons, not groups[ ]" and "all governmental action based on race [ ] should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Id.* This Court further held:

> [T]hat whenever the government, [federal or state], treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.

Id. at 229-230. Thus, because Ms. Shook has been treated "unequally because of [ ] her race" by Montana's regulation denying her the right to hunt on non-Indian fee property, including her own property, within the exterior boundaries of the Flathead Indian Reservation, she "has suffered an

injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."

Thus, the Montana Supreme Court's decision is in direct conflict with decisions of this Court limiting the applicability of *Mancari* and applying strict scrutiny to all racial classifications, including those involving American Indians. For these reasons, this Petition should be granted.

II. THE DECISION OF THE MONTANA SUPREME COURT, THAT A GOVERNMENTAL PREFERENCE IN FAVOR OF TRIBAL MEMBERS IS SUBJECT TO A RATIONAL BASIS STANDARD OF REVIEW, IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT*.

In *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), the Ninth Circuit Court of Appeals held unconstitutional on equal protection grounds the Interior Board of Indian Appeals' ("IBIA") interpretation of the Reindeer Act of 1937, 25 U.S.C. § 500, *et seq.*, which prohibited non-Natives from herding reindeer in Alaska. The Ninth Circuit noted, notwithstanding *Mancari*, that there was doubt as to the appropriate constitutional standard of review to be applied.

The Ninth Circuit recognized that in *Adarand*, Justice Stevens dissented on several grounds, including that the majority would subject preferences for Native Americans to the same scrutiny as invidious discrimination against minorities. *See, Williams*, 115 F.3d at 665 (citing *Adarand*, 515 U.S. 244-45 (Stevens, J., dissenting)). The Ninth Circuit

surmised that "*Mancari's* days are numbered" if this Court's equal protection jurisprudence in *Adarand* controls. *Id.* Indeed, the Ninth Circuit, applying strict scrutiny under *Adarand*, held that the IBIA's interpretation raised "grave" constitutional questions under the Equal Protection Clause. *Id.* at 666. *But see, U.S. Air Tour Assoc., et al. v. Federal Aviation Admin., et al.*, 298 F.3d 997 (D.C. Cir. 2002) (applying *Mancari's* rational basis test to Indian preferences notwithstanding this Court's decision in *Adarand*).

In *Williams*, the Ninth Circuit further interpreted this Court's decision in *Mancari* "as shielding only those statutes that affect uniquely Indian interests." *Id.* at 665. The Ninth Circuit acknowledged that the preferences involved in *Mancari* directly promoted Indian interests in self-government, whereas in *Williams* the court was dealing, not with matters of tribal or Native self-regulation, but with federal regulation of conduct within Native country implicating Native interests. *Id.* (citing *United States v. Antelope*, 430 U.S. 641, 646 (1977)). The Ninth Circuit court noted:

> While *Mancari* did not have to confront the question of a naked preference for Indians unrelated to unique Indian concerns, [the] IBIA's interpretation of the Reindeer Act would force us to confront that very issue. According to [the] IBIA, the Reindeer Act provides a preference in an industry that is not uniquely native, whether the beneficiaries live in a remote native village on the Seward Peninsula or in downtown Anchorage.

Id. at 664. Applying a strict scrutiny standard and rejecting *Mancari*, the Ninth Circuit held that the IBIA's interpretation of the law denying non-Natives the same treatment

as Natives could not withstand the requirements of an equal protection analysis. *Id.* at 665-66. The Ninth Circuit reasoned that the IBIA's interpretation provided "a naked preference for Indians unrelated to unique Indian interests," because it involved a commercial industry "that is not uniquely native." The Ninth Circuit found that the preference "in no way related to native land, tribal or communal status or culture." *Id.* at 663.

Similar to *Williams*, this case involves a regulation that provides a blanket preference denying non-tribal members the same treatment as tribal members by prohibiting non-tribal members from hunting on their own land within the exterior boundaries of an Indian reservation. The Montana Supreme Court's explanation that this ban is an "entirely rational means to preserve wildlife populations for hunting by Indians[ ]" is erroneous. App. 8. Hunting is not a "uniquely Indian interest," such as tribal self-government, that warrants limited scrutiny under the *Mancari* analysis. The Indians of the Flathead Reservation do not possess an exclusive right to hunt on all lands within the exterior boundaries of the reservation. App. 34-35. Hunting does not threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribes of the Flathead Indian Reservation. Moreover, as this Court has noted, hunting by non-Indians on fee lands within a reservation does not necessarily imperil the welfare of a tribe. *See*, *Atkinson*, 532 U.S. at 651; *Montana*, 450 U.S. at 464-66.

Accordingly, just as the Ninth Circuit applied strict scrutiny in *Williams* to a blanket preference affecting non-Natives and an interest that is not uniquely Native, the Montana Supreme Court should have applied strict scrutiny in this case. Because a direct conflict exists between the

decisions of the Montana Supreme Court and the Ninth Circuit regarding the application of *Mancari* and *Adarand* to preferences affecting non-Natives or non-tribal members, this Petition should be granted.

CONCLUSION

For the foregoing reasons, Ms. Sandra Shook respectfully requests that this Court grant her Petition for *Writ of Certiorari*.

Respectfully submitted,

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Attorneys for Petitioner

Dated: May 9, 2003.

No. 99-608

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2002 MT 347

STATE OF MONTANA,

Plaintiff and Respondent,

v. (Filed Dec. 30, 2002)

SANDRA WHITE SHOOK,

Defendant and Appellant.

APPEAL FROM:

District Court of the Twentieth Judicial District,
In and for the County of Sanders,
The Honorable C. B. McNeil, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Tom D. Tobin; Tobin Law Office, Winner, South Dakota

For Respondent:

Hon. Mike McGrath, Attorney General; Sarah A. Bond, Assistant Attorney General, Helena, Montana

Robert Zimmerman, Sanders County Attorney, Thompson Falls Montana

For Amicus Curiae:

John B. Carter, Daniel F. Decker, Tribal Legal Department, Confederated Salish and Kootenai

Tribes, Pablo, Montana (for Confederated Salish and Kootenai Tribes)

Maylinn Smith, Indian Law Clinic, University of Montana, Missoula, Montana (for Montana-Wyoming Tribal Judges Association)

Submitted on Briefs October 4, 2001

Decided: December 30, 2002

Filed:

/s/ [Illegible]
Clerk

Justice James C. Nelson delivered the Opinion of the Court.

¶1 Appellant Sandra White Shook (Shook) appeals an order of the Twentieth Judicial District Court, Sanders County, denying her motion to dismiss the charge against her and upholding the Montana Fish, Wildlife and Parks Commission (Commission) regulation prohibiting non-tribal members from hunting big game on all Indian reservations in Montana. We affirm.

¶2 We address the following issues on appeal:

¶3 1. Did the District Court properly conclude that the state's big game hunting closure to non-tribal members on Indian reservations does not violate constitutional guarantees of equal protection?

¶4 2. Did the District Court properly conclude that the state's big game hunting closure to non-tribal members on Indian reservations is not an unlawful exercise of the powers of the Commission?

I. FACTUAL AND PROCEDURAL BACKGROUND

¶5 On or about November 16, 1997, Shook shot and killed a whitetail buck on private property within the exterior boundaries of the Flathead Indian Reservation. Under Commission hunting regulations, big game hunting privileges on Indian Reservations are limited to tribal members only, thereby closing the hunting season to non-tribal members. Shook is not a tribal member. Further, Shook did not own the private property where she hunted, nor was the property owned by a tribal member. Shook was charged with hunting within a closed area in violation of § 87-1-304, MCA, with the penalty provided in § 87-1-102, MCA.

¶6 Shook pleaded guilty in justice court. However, pursuant to § 46-12-204(3), MCA, she reserved her right to a review of the adverse determination of her initial motion to dismiss. Shook then appealed to the District Court, asserting in her renewed motion to dismiss that the closure to non-tribal members was invalid for several reasons. The parties then stipulated to facts sufficient to establish the offense charged.

¶7 Based on the stipulated facts, the District Court addressed Shook's motion to dismiss and concluded that the regulation limiting big game hunting on reservations to tribal members did not violate the Montana Constitution and was a valid exercise of the powers of the Commission. Shook subsequently pleaded guilty, admitting in open court to killing a whitetail deer on private property within the Flathead Reservation that she did not own, and admitting to knowing that the area was closed under Commission regulations. Shook was sentenced and appealed the District Court's ruling.

¶8 After Shook filed her notice of appeal, Shook and the State stipulated to a motion to vacate the appeal in this Court in order to allow for possible resentencing by the District Court. However, the District Court declined to resentence in an order dated March 12, 2001. As a result, Shook then proceeded with this appeal. We allowed the Confederated Salish and Kootenai Tribes (the Tribes) and the Montana-Wyoming Tribal Judges Association to submit *amici* briefs.

II. STANDARD OF REVIEW

¶9 In this case, the District Court's order denying Shook's motion to dismiss is based entirely on conclusions of law regarding the legality of the state's big game hunting prohibition for non-tribal members on land within the exterior boundaries of Indian reservations in the state. Accordingly, we review the District Court's conclusions of law to determine whether those conclusions are correct. *Zempel v. Uninsured Employers' Fund* (1997), 282 Mont. 424, 428, 938 P.2d 658, 661. Further, we will affirm the District Court's ruling if the court reached the correct result for the wrong reason. *State v. Parker,* 1998 MT 6, ¶ 20, 287 Mont. 151, ¶ 20, 953 P.2d 692, ¶ 20.

III. DISCUSSION

¶10 **1. Did the District Court properly conclude that the state's big game hunting closure to non-tribal members on Indian reservations does not violate constitutional guarantees of equal protection?**

¶11 The 1997 Commission regulation at issue here reads: "Big game hunting privileges on Indian Reservations are

limited to tribal members only." While a copy of the regulation at issue was not entered into the trial court record by either party, the parties stipulated to this language in the District Court proceedings.[1] This regulation was promulgated pursuant to § 87-1-304(1)(a)(i), MCA, which reads: "The commission may . . . fix seasons, bag limits, possession limits, and season limits." As mentioned, Shook was prosecuted for hunting during a closed season in violation of § 87-1-304, MCA.

¶12 Shook first asserts that the state's big game hunting closure to non-tribal members on reservations is an unconstitutional violation of equal protection because it distinguishes between tribal members and non-tribal members on the basis of race. The State and the Tribes counter that laws that distinguish between persons based on tribal membership have long been held constitutional under equal protection requirements because the distinction is political rather than racial. The District Court agreed with the State and held that tribal membership was a valid political classification.

¶13 We agree with the State, with the Tribes, and with the District Court. The United States Supreme Court has already explicitly considered whether laws that distinguish

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[1] We note here that the corresponding 2002 regulation is substantially similar. Under the 2002 "Big Game Hunting Regulations, Preparing for Your Hunt, Closed Areas" the corresponding regulation reads:

> Indian Reservations are limited to Tribal members only for big game hunting privileges unless otherwise provided for by agreements between the State of Montana and a Tribal Government.

based on tribal membership violate equal protection in *Morton v. Mancari* (1974), 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290. In that case, the Court addressed Bureau of Indian Affairs employment preferences for Indians and held that the preferences were not unconstitutional classifications. The Court stated:

> Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.
>
> . . . .
>
> . . . The preference is not directed towards a "racial" group consisting of "Indians", instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Morton, 417 U.S. at 552-54, 94 S.Ct. at 2483-85. The Court went on to hold that laws that afford Indians special treatment are constitutional as long as those laws can be tied rationally to the fulfillment of the unique federal obligation toward Indians. *Morton*, 417 U.S. at 555, 94 S.Ct. at 2485. *See also United States v. Antelope* (1977), 430 U.S. 641, 647, 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701 (federal criminal code applicable in Indian country does not violate equal protection).

¶14 The State of Montana is required to follow this federal precedent by the express terms of both our own Constitution and the federal enabling act establishing Montana as a state. Specifically, following the Preamble to the Montana Constitution, Article I, the Compact With the United States, requires that the State abide by "the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States." *See also* Act of Feb. 22, 1889, 25 Stat. 676. Based on this requirement, we have previously held that Indian treaties are "regarded as a part of the law of the state as much as the state's own laws and Constitution[,] [are] effective and binding on [the] state legislature[ ] . . . [and are] superior to the reserved powers of the state, including the police power." *State v. McClure* (1954), 127 Mont. 534, 539-40, 268 P.2d 629, 631. *See also State v. Stasso* (1977), 172 Mont. 242, 246, 563 P.2d 562, 564 (treaty provisions "must be considered as a reservation by the Indians, rather than a grant by the federal government").

¶15 Consequently, federal Indian law regarding the rights of Indians is binding on the state. Therefore, the state equal protection guarantee under Article II, Section 4, must allow for state classifications based on tribal membership if those classifications can rationally be tied to the fulfillment of the unique federal, and consequent state, obligation toward Indians. *Cf. Zempel*, 282 Mont. at 430-33, 938 P.2d at 662-64 (failure of state workers' compensation fund to cover workers under tribal jurisdiction does not violate equal protection). Indeed, our own Constitution makes a distinction regarding Indians in Article X, Section 1(2) ("The state recognizes the distinct and unique cultural heritage of the American Indians and

is committed in its educational goals to the preservation of their cultural integrity.").

¶16 Therefore, we need only address whether the state regulation that prohibits non-tribal members from hunting big game on Indian reservations is rationally tied to the fulfillment of the unique obligation towards Indians. We hold that it is. There are seven Indian reservations in Montana each established by treaty and agreements with the federal government. The majority of the treaties establishing the reservations reserve some type of hunting or fishing rights to the respective tribes. *See, e.g.,* Treaty with the Flatheads, Etc. of July 16, 1855, 12 Stat. 975 (commonly called the Hellgate Treaty). At the same time, we have already held that the state can regulate the hunting activities of non-tribal members on reservations unless precluded by an act of Congress or tribal self-governance matters. *State ex rel. Pepstad v. Danielson* (1967), 149 Mont. 438, 443, 427 P.2d 689, 692. *See also Montana v. United States* (1981), 450 U.S. 544, 564, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493.

¶17 Accordingly, under Article I, the State, and in this case the Commission, has a duty to regulate hunting by non-tribal members in a way that recognizes the Indian hunting privileges protected by federal law. The regulation at issue here deals with the state's obligation by simply prohibiting hunting by non-tribal members on reservations. This is an entirely rational means to preserve wildlife populations for hunting by Indians. Therefore, the regulation is rationally related to the federal, and consequent state, obligation to recognize tribal hunting privileges.

¶18 Despite the straightforward approach of the regulation, Shook asserts that the regulation is arbitrary because no studies have been done to show if big game wildlife populations on the reservations are over hunted by tribal members. Shook further asserts that conservation purposes could be accomplished by other legitimate means. While there may be other means to conserve the big game wildlife, we simply disagree this invalidates the regulation. When a law is assessed for a rational basis, exact precision or efficiency is not necessary. *See Baldwin v. Fish & Game Comm'n* (1978), 436 U.S. 371, 390, 98 S.Ct. 1852, 1864, 56 L.Ed.2d 354 ("That [Montana] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."); *McClanathan v. Smith* (1980), 186 Mont. 56, 67-68, 606 P.2d 507, 513. As already stated, the regulation at issue here is rationally related to its objective and is therefore constitutionally permissible.

¶19 In addition, we agree with the State that the District Court properly denied Shook's request for an evidentiary hearing regarding her argument that the regulation violated equal protection. Such a hearing was not necessary to decide the issues of law presented by Shook to the trial court and this Court. Further, although Shook alleges in passing that the regulation is not enforced uniformly across the reservations, Shook did not properly preserve this issue for appeal. The general rule is that issues not raised before the trial court and new legal theories are not considered by this Court on appeal because it is unfair to fault the trial court on an issue it was never given an opportunity to consider. *Unified Indus., Inc. v. Easley,*

1998 MT 145, ¶ 15, 289 Mont. 255, ¶ 15, 961 P.2d 100, ¶ 15.

¶20 Finally, we note that while we agree with the *amicus* Montana-Wyoming Tribal Judges Association that the treaties and agreements involving the seven reservations in Montana are each unique, we do not agree that this prevents the state from designing a big game hunting regulation regarding Indian reservations that applies statewide. Indeed, the regulation at issue serves to assure that big game populations on all the reservations are preserved. *See also* 2002 Big Game Hunting Regulations, Preparing for Your Hunt, Closed Areas (regulation provides for agreements specific to each tribe).

¶21 **2. Did the District Court properly conclude that the state's big game hunting closure to non-tribal members on Indian reservations is not an unlawful exercise of the powers of the Commission?**

¶22 Shook next asserts that the regulation is an unauthorized exercise of regulatory power by the Commission because there is no statute directly authorizing the regulation and because there is no corresponding legislative history regarding tribal hunting issues or wildlife conservation on the reservations. Consequently, Shook argues that the regulation exceeds the scope of § 87-1-304(1)(a), MCA. Shook also asserts that the regulation contradicts state law requiring consent of the owner to close their land to hunting. The State and the Tribes assert that the Commission had proper authority to promulgate the regulation and that the Commission was required to recognize the Indian rights protected by federal law in designing its regulations. The State

further asserts that the consent laws regarding wildlife refuges are not at issue in this case and that closed seasons apply regardless of land ownership.

¶23 The District Court held that regulating hunting seasons was within the scope of the Commission, that the Commission regulation does not create a refuge, that Shook did not hunt on her own land and therefore could not raise the issue of the consent laws, and that legislative intent expressing that Commission regulations must recognize federal law was unnecessary. Further, the District Court stated that 18 U.S.C. § 1165, gave the Tribes exclusive authority to regulate hunting on the reservation.

¶24 We agree with the District Court, with the exception of its discussion of 18 U.S.C. § 1165 as discussed below.

¶25 Under § 87-1-301(1)(a), MCA, the Commission is charged with setting "policies for the protection, preservation, and propagation of the wildlife . . . of the state and for the fulfillment of all other responsibilities of the department as provided by law." *See also* § 87-1-301(1)(b), MCA. In fulfilling this directive, the Commission must promulgate regulations that are in accordance with general requirements of state law. As mentioned above, Indian treaties are effectively a binding part of state law. Indeed, we have previously held that the state is required to recognize Indian rights despite the fact that those rights are not specifically mentioned. *State ex rel. Greely v. Confederated Salish & Kootenai Tribes* (1985), 219 Mont. 76, 95, 712 P.2d 754, 765-66. In *Greely*, we stated:

> We recognize that the Water Use Act of Montana does not explicitly state that the Water Court

> shall apply federal law in adjudicating Indian reserved rights. However, we conclude that is not fatal to the adequacy of the Act on its face. We hold that state courts are required to follow federal law with regard to those water rights.

Greely, 219 Mont. at 95, 712 P.2d at 765-66.

¶26 Because of the supremacy of federal law on matters related to Indian treaties, we have also held that state statutes do not violate equal protection in excluding Indians, even when the exclusion is not specifically mentioned. *Zempel*, 282 Mont. at 430, 938 P.2d at 662 (plaintiff was excluded from state Uninsured Employer's Fund coverage by controlling principles of federal law regarding state jurisdiction over Indian reservations, rather than by the statutory definition itself).

¶27 Therefore, contrary to Shook's assertions, it is not necessary that § 87-1-301, MCA, or § 87-1-304, MCA, specifically mention Indian hunting rights in order for the Commission to have proper authority to promulgate a regulation that recognizes those rights under state law. Similarly, it is not necessary that the Commission be directed by legislative intent, studies, or committee minutes specific to the issue in order to recognize Indian hunting rights. Accordingly, we hold that the District Court properly concluded that the Commission did not exceed its powers in promulgating the regulation closing big game hunting pursuant to its directive to set seasons under § 87-1-304(1)(a), MCA, or § 87-1-301(1), MCA.

¶28 We note in making this holding that in addition to the fact that the Commission must recognize Indian hunting privileges when promulgating regulations, the Commission must also take into account § 87-1-228, MCA,

which explicitly recognizes the tribal hunting rights relative to the Flathead Reservation. Further, the Commission must also take into account litigation in Montana's federal District Court regarding the issue of jurisdiction to regulate hunting on the Flathead Reservation. *See Confederated Salish & Kootenai Tribes v. State* (1990), 750 F. Supp. 446, and subsequent Order in CV 90-49-M-CCL (May 8, 1991). This litigation specifically recognized that the issue of jurisdiction to regulate hunting on reservations was extremely complex and best left to resolution by agreement between the State and the Tribe. *See* Order in CV 90-49-M-CCL (May 8, 1991) (staying the proceedings for the duration of the settlement agreement between the State and the Tribe which is still in effect). [Therefore, in the case of the Flathead Reservation, the regulation at issue here is specifically required by that agreement. [Ct struck as result of Pet. for Rehearing]]

¶29 In support of her argument, Shook cites cases in which we have found an agency improperly exceeded the scope of an authorizing statute. However, those cases are all distinguishable simply because none involve additional laws that the agency was required to acknowledge in designing the regulation. *See, e.g., Safeway, Inc. v. Montana Petroleum Release Compensation Bd.* (1997), 281 Mont. 189, 931 P.2d 1327 (administrative rule that required that tank be in place when tank release was discovered, added additional requirements to statute that invalidated rule).

¶30 We also agree with the State that the District Court was correct in holding that § 87-1-305, MCA, which allows the Commission to establish wildlife refuges on private land with landowner consent, was not relevant to Shook's case. First, as the District Court stated, the closed season

in this case does not create a refuge. Second, contrary to Shook's position, this case does not present the issue of the rights of someone hunting on their own land because it is undisputed that she was not hunting on her own land. Therefore, the District Court correctly held that Shook's conviction under the regulation did not conflict with § 87-1-305, MCA.

¶31 Further, as mentioned, we will affirm the trial court when it reaches the correct result for the wrong reason. In this case, the court cited 18 U.S.C. § 1165,[2] for the proposition that the Tribes have exclusive jurisdiction to regulate hunting on the reservation. However, that statute is inapplicable to the case at bar because Shook was charged in state court with violating § 87-1-304, MCA; she was not charged in federal court with a violation of federal law. Therefore, because the District Court correctly concluded that the regulation does not violate equal protection and correctly concluded that the Commission did not exceed its authority in promulgating the closed season on Indian reservations, we affirm the court's result even though it erred in citing 18 U.S.C. § 1165.

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[2] 18 U.S.C. § 1165, reads:

> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined under this title or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

32 Finally, Shook asserts on appeal that she waived her right to trial only for the determinations at issue here and that if this Court concludes the District Court properly denied her motion to dismiss, she is still entitled to a trial on the merits. Shook quotes the transcript at length in order to demonstrate that she did not waive her right to trial and notes that the stipulated facts approved by the court specifically reserve her right to "litigate the below facts" should she lose the motion to dismiss.

¶33 The State asserts that the issue of whether Shook retained her right to trial is not properly before the Court. We agree. Shook initially pleaded guilty in justice court and pursuant to § 46-17-203(2), MCA, she waived her right to trial on the merits in the District Court. Consequently, the transcript of the proceedings in the District Court regarding this issue is irrelevant. Therefore, Shook is not entitled to a trial on the merits. Further, the record establishes that Shook knowingly pleaded guilty to undisputed facts because she wished to litigate the questions of law regarding the regulation. Finally, she made no motion to withdraw her plea, so the issue was not preserved.

IV. CONCLUSION

¶34 Because the District Court properly concluded that the Commission regulation closing Indian reservations to big game hunting by non-tribal members was a constitutionally permissible exercise of authority within the statutory powers of the Commission, we affirm.

/s/ James C. Nelson
Justice

We concur:

/s/ Karla M. Gray
Chief Justice

/s/ Patricia Cotler

/s/ Jim Regnier

/s/ Terry N. Trieweiler
Justices

C.B. McNEIL
District Court Judge
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MONTANA TWENTIETH JUDICIAL
DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA, Plaintiff, vs. SANDRA C. SHOOK, Defendant	Cause No: DC-98-08 JUDGMENT

(Filed Aug. 31, 1999)

The above-entitled Cause came on regularly before the Court on the 28th day of April, 1998 upon the Defendant's Notice of Appeal from a prior guilty plea entered in the Sanders County Justice Court to the offense of VIOLATING RULES AND REGULATIONS OF THE MONTANA FISH AND GAME COMMISSION, a misdemeanor, in violation of § 87-1-304 MCA.

On August 24, 1999 the Defendant personally appeared before the Court with her counsel, Lisa Kauffman. At that time the Defendant entered a conditional plea of guilty to the offense of VIOLATING RULES AND REGULATIONS OF THE MONTANA FISH AND GAME COMMISSION, a misdemeanor, in violation of § 87-1-304 MCA, to-wit, taking game in an area closed to hunting by the Montana Fish and Game Department. The Defendant

reserved her right to appeal this Court's denial of her motion to dismiss the charge.

The Court determined that the Defendant's guilty plea was made knowingly and voluntarily and established a factual basis for the Defendant's guilty plea.

IT IS ADJUDGED AND DECREED that the Defendant Sandra C. Shook is guilty of the offense of VIOLATING RULES AND REGULATIONS OF THE MONTANA FISH AND GAME COMMISSION, a misdemeanor.

The State and the Defendant waived additional time before proceeding to sentencing, and the Court proceeded to sentencing after hearing the recommendations of the parties.

IT IS THE JUDGMENT OF THE COURT that the Defendant Sandra C. Shook is hereby sentenced to five (5) days in the Sanders County Jail. That, however, all of the Defendant's sentence in the Sanders County Jail is hereby suspended.

IT IS FURTHER THE JUDGMENT OF THE COURT that the Defendant shall pay a fine in the amount of Five Hundred Dollars ($500) and a Twenty Dollar ($20) surcharge. All financial obligations shall be paid through the Sanders County Clerk of the District Court within four (4) months of the date of this Judgment.

In addition to the above-imposed sentence and fine the Defendant shall forfeit all privileges to hunt in the State of Montana for a period of twenty-four (24) months from the date of conviction.

The reasons for this Judgment are as follows:

1. It provides for punishment of the Defendant.

2. It provides an opportunity for rehabilitation of the Defendant.

3. It will serve as a deterrence to Defendant and others from intentional violations of the Montana Fish and Game regulations.

DONE this 24th day of August, 1999.

SIGNED this 31st day of August, 1999.

/s/ C.B. McNeil
C.B. McNEIL
DISTRICT COURT JUDGE

I hereby certify that I have mailed
a true copy of this document to:

/s/ Lisa Kauffman
/s/ Sandra Shook
/s/ County Atty Zimmerman (hand delivered)
by depositing in the U.S. Mail

this date 9-1-99
/s/ Dianne F. Triplett
Clerk of Court

MINUTE ENTRY
August 24, 1999

DC 98-08

STATE OF MONTANA ZIMMERMAN

vs.

SANDRA WHITE SHOOK KAUFFMAN

Personally present were:
Defendant Sandra Shook
Lisa B. Kauffman, Defense Counsel
County Attorney Bob Zimmerman, counsel for State

This matter came before the Court for Sentencing hearing. All parties advised they were prepared to proceed to sentencing. Defense counsel stated for the record that by entering her plea, defendant was in no way relinquishing her right to appeal.

Defendant has been advised of her rights. The Court questioned defendant as to her understanding of her rights and found her competent to plead. Defendant pleads guilty and is sworn and testifies. The Court accepts defendant's guilty plea and finds the defendant guilty as charged.

The parties are prepared to proceed to sentencing. Upon inquiry by the Court, State and Defense make their sentencing recommendations. The sentence of the Court is: 1) fine of $500.00; 2) surcharge of $20.00; 3) 5 days in the SC Jail, all suspended if fine paid within 4 months; 4) loss of all hunting privileges for 24 months.

Defense counsel moves the Court for a stay of execution of judgment. Defense counsel further notes for the

record that she is tendering all records to defendant, along with a Notice of Appeal; and she further advises the Court that as the defendant is agreeable to her release as Defense counsel, she would request that the Court allow her withdrawal. Court inquires of defendant if she plans to proceed pro-se, or hire another attorney.

Court takes the motion for stay of execution under advisement. Court advises Defense counsel that it would like her Motion to Withdraw in writing for the Court file.

Done in open Court with the Honorable Judge C. B. McNeil presiding. Barb Marshall, Court Reporter.

cc: Bob Zimmerman
Sandra Shook
Lisa Kauffman

Dianne F. Triplett
Sanders County Clerk of Court

C. B. McNeil
District Judge
Lake County Courthouse
106 Fourth Avenue East
Polson, MT 59860-2171
Telephone: (406) 883-7250

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA,	*	CAUSE NO. DC-98-08
Plaintiff,	*	**ORDER DENYING MOTION TO DISMISS, JUDGMENT and ORDER SETTING SENTENCING HEARING**
vs.	*	
SANDRA C. SHOOK,	*	
Defendant.	*	

* * * * * * * * * * * * * * * * * *

The above cause came before the Court upon an appeal from the Justice Court of Sanders County and the parties' Stipulated Facts filed July 14, 1998, the Defendant's Motion filed August 25, 1998 to Dismiss the Complaint, supported by brief, Plaintiff's Answer Brief filed October 29, 1998 and Defendant's Reply Brief filed March 30, 1999, and good cause appearing therefore, the Court enters the following:

ORDER

1. Defendant's Motion to dismiss is denied.

2. Pursuant to the July 14, 1999 Stipulated Facts, the Defendant is hereby found guilty of violating §87-1-304, MCA, with penalty provided in §87-1-102, MCA, Fixing of seasons ... as

charged in Department of Fish, Wildlife and Parks Complaint #520A123106.

3. Sentencing is set for August 24, 1999 at 10:00 a.m. in the courtroom of the Sanders County Courthouse.

Opinion

In her Motion to Dismiss, the Defendant challenges the authority of the Montana Fish and Game Commission to designate the Flathead Indian Reservation as a "Closed Area" to non-tribal members in the 1997 Montana Big Game Hunting Regulations.

The following issues are in the order raised in Defendant's brief:

1. EQUAL PROTECTION.

Defendant claims that the Fish and Game regulations limits the rights of hunters because of their race and are unconstitutional violations of the equal protection clause. In a Lake County civil case, *Geiger vs. Pierce*, DV-86-297, this Court suggested that tribal membership as a basis for precluding state court jurisdiction was an ethnic distinction and therefore violative of both the State of Montana and U. S. constitutional equal protection clauses. The Montana Supreme Court in that case, as found in 233 Mont. 18, followed, as it must, federal court precedents based upon a political classification and not a racial classification and concluded that there was no equal protection violation.

The authorities cited in Plaintiff's Answer Brief are incorporated by reference, and this Court now follows that precedent in holding that the regulations violated by

Defendant do not violate the constitutional equal protection clauses.

2. LEGITIMATE STATE INTEREST.

Defendant claims that the statute and regulations challenged serve no legitimate State interest. The Lilburn, Huebner and Godfrey cases referred to in Plaintiff's Answer Brief are authority that the State not only has a legitimate purpose but also a duty to set and enforce regulations for the protection of wildlife resources. In addition, the State has a legitimate State interest in providing hunting and fishing opportunities for non-tribal members on the Flathead Reservation that would not otherwise be available without cooperation and agreements between the State and the Tribal Council of the Confederated Salish & Kootenai Tribes.

Under federal law, 18 USC 1165, the Tribe has the exclusive authority to regulate hunting, fishing and trapping within the reservation. By cooperative agreements between the State and the Tribe, non-tribal members can fish and hunt pheasants and huns and hunt migrating waterfowl such as ducks and geese on both tribal and non-tribal lands within the reservation. The State has a legitimate interest in making those sporting opportunities available which could be foreclosed in the absence of the regulations Defendant complains of.

3. WILDLIFE REFUGE.

Defendant claims that the challenged regulations create a refuge on private land without the consent of the owner. Her argument fails for several reasons. The Commission did not create any refuge within the Flathead Reservation. The Defendant does not own the private land

within the reservation where she shot the whitetail buck involved in this case. The Defendant is not charged with any violation of §87-1-305(1), MCA, which is the statute she claims was violated by

4. SCOPE OF COMMISSION.

Defendant claims that the challenged regulation is outside the scope of the Commission to restrict hunting to Indians only. §87-1-301, MCA, provides, in part, that the Commission shall set policies for the protection and preservation of wildlife and establish the hunting, fishing and trapping rules of the department. The opening and closing of hunting seasons is clearly within the scope of the statutory purpose of the Commission. The constitutional challenges based upon an alleged race distinction is discussed under the other issues herein.

5. DISTINCTION BETWEEN TRIBAL AND NON-TRIBAL.

Defendant claims that there is no legislative intent to distinguish between tribal and non-tribal members hunting on the reservation. It is unnecessary for either the Legislature or the Commission to state that federal law is paramount.

Pursuant to treaties between the U. S. and the Tribe and federal law set forth above, the U. S. and the Tribe have exclusive authority over hunting, fishing and trapping with the Flathead Reservation. The State does have such authority as may be agreed upon between the State and the Tribe without the necessity of any expressed legislative intent other than that stated in the statutory purposes of the Fish and Game Commission.

CONCLUSION

The constitutionality and legality of the statute and regulation of the Fish and Game Commission challenged by Defendant are herein upheld by this Court. The Defendant's request for an evidentiary hearing is denied as being unnecessary. The Stipulated Facts filed July 14, 1998 are sufficient for a final resolution of the Defendant's motion and ultimate issue before this Court.

The Defendant shot and tagged a whitetail buck on November 16, 1997 on fee simple property within the exterior boundaries of the Flathead Reservation. The 1997 Montana Big Game Hunting Regulations designated that big game hunting privileges on Indian Reservations are limited to tribal members only. Defendant is not a tribal member. These agreed facts applied to the law herein upheld are sufficient for the entry of judgment that Defendant is guilty of the offense charged.

DATED this 5th day of August, 1999.

/s/ C. B. McNeil
C. B. McNeil, District Judge

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 99-608
2002 MT 347A

STATE OF MONTANA, Plaintiff and Respondent. v. SANDRA WHITE SHOOK, Defendant and Appellant.	ORDER Filed Feb. 11, 2003

Before this Court is Sandra Shook's Petition for Rehearing. We find no grounds under Rule 34, M.R.App.P., for granting the rehearing. However, in its response to the petition, the State raised an issue regarding our Opinion in *State v. Shook,* 2002 MT 347, 313 Mont. 347, ___ P.3d ___, which we address here. The last sentence of ¶ 28 in *Shook* reads: "Therefore, in the case of the Flathead Reservation, the regulation at issue here is specifically required by that agreement." The State asserts that this statement is error. The State also points out that the statement is dictum.

We agree that the statement is dictum. However, we do not agree that the statement is error. This statement was made based on the briefing by the State and the Confederated Salish & Kootenai Tribes (the Tribes) and based on the opinion issued in federal district court in *Confederated Salish & Kootenai Tribes v. State* (D.Mont.1990), 750 F.Supp. 446, 447.

First, in the federal litigation, the court clearly stated that the Tribes were contesting jurisdiction over all hunting and fishing on the reservation. The opinion states:

> Plaintiff [the Tribes] filed this suit seeking declaratory judgment that the State of Montana (State) has no authority to regulate hunting and fishing on the Flathead Indian Reservation (Reservation), and that regulation of hunting and fishing within the exterior boundaries of the Reservation is exclusively vested in the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (Tribes or Indians). *The Tribes also seek a permanent injunction prohibiting the State from enforcing its hunting and fishing regulations on the Reservation.* [Emphasis added.]

Further, as the State and the Tribes agree, that litigation is stayed pending the duration of the settlement agreement between the State and the Tribes. *See* Order, CV 90-49-M-CCL (May 8, 1991). Finally, the State stated in its briefing in *Shook* that the issues involved in the federal case were "settled by a bird hunting and fishing agreement, and by a continuation of this prior regulation prohibiting nonmembers from big game hunting there." Therefore, the last sentence of ¶ 28 quoted above merely refers to the State's representation that were the State to discontinue the prohibition on the Flathead Reservation against big game hunting by non-tribal members, the federal stay would no longer be in effect.

However, because the last sentence of ¶ 28 is dictum and is not intended to bind any future interpretations regarding the issue of jurisdiction over hunting and fishing on the Flathead Reservation, we hereby amend the

Shook Opinion to delete the last sentence from ¶ 28 in its entirety. Accordingly,

IT IS ORDERED that the last sentence of ¶ 28 of *State v. Shook,* 2002 Mont. 347, 313 Mont. 347, ___ P.2d ___, is deleted in its entirety.

IT IS FURTHER ORDERED that Appellant's Petition for Rehearing filed with this Court is DENIED.

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this Order to all recipients of our Opinion in *State v. Shook,* 2002 Mont. 347, 313 Mont. 347, ____ P.3d ____.

DATED this 11th day of February, 2003.

/s/ Karla M. Gray
Chief Justice

/s/ James C. Nelson

/s/ Patricia Cotter

/s/ Jim Regnier

Justices

Justice Terry N. Trieweiler would deny the Petition for Rehearing without revising the Court's Opinion.

DATED THIS 11th day of February 2003.

/s/ Terry Trieweiler
Justice

Montana Constitution

Preamble We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

ARTICLE I

COMPACT WITH THE UNITED STATES

All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

ARTICLE II

DECLARATION OF RIGHTS

* * *

Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political

rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

* * *

ARTICLE X

EDUCATION AND PUBLIC LANDS

Section 1. Educational goals and duties.

* * *

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

Montana Big Game Hunting Regulations, 1997

[Page 1] By order of the Montana Fish, Wildlife & Parks Commission, the seasons, limits and regulations listed herein shall govern the 1997 deer, elk, black bear, antelope, moose, bighorn sheep, mountain goat and mountain lion hunting seasons. These regulations are valid March 1, 1997 through February 28, 1998 and were adopted by the Fish, Wildlife & Parks Commission on October 4, 1996.

* * *

[Page 3] **Closed Areas**

- . . . Big game hunting privileges on Indian Reservations are limited to tribal members only.

* * *

[Page 4] **Property Laws**

- **Permission to Hunt Big Game** – Montana Law requires that big game hunters must have permission of the landowner, lessee or their agent before hunting big game animals on private property, regardless of whether the land is posted or not.

2003 Montana Hunting Regulations – Deer, Elk, Antelope

[Page 3] **Landowner Permission Required**

- Montana Law requires that hunters must have permission of the landowner, lessee

or their agent before hunting on private land. See page 10.

* * *

- These regulations are adopted under the authority granted to the Fish, Wildlife & Parks Commission in (FWPC) section 87-1-301, MCA and are valid March 1, 2003 through February 29, 2004. These regulations were adopted by the FWPC on February 12, 2003.

* * *

[Page 10] **PRIVATE LAND**

- Montana Law **requires** that hunters have the permission of the landowner, lessee, or their agent before hunting on private property, regardless of whether the land is posted or not . . .

* * *

[Page 11] **PUBLIC LAND**

* * *

Closed Areas

* * *

- **Indian Reservations** are limited to Tribal members only for big game hunting privileges unless otherwise provided for by agreements between the State of Montana and a Tribal Government.

* * *

The Office of the President of the United States

(TREATY)

TREATY WITH THE FLATHEADS, ETC., 1855.

July 16, 1855.

* * *

ARTICLE 3

* * *

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians.

Concluded at Hell Gate in the Bitter Root Valley, July 16, 1855.
Ratified by the Senate, March 8, 1859.
Proclaimed by the President of the United States, April 18, 1859.

* * *

ARTICLE III.

* * *

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

No. 02-1658

In The

Supreme Court of the United States

SANDRA SHOOK,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Montana Supreme Court's decision properly uphold a state regulation prohibiting nontribal members from big game hunting on Indian reservations absent a state/tribal cooperative agreement administratively regulating the activity, as a reasonable measure for conserving big game species?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
REASONS THE PETITION SHOULD BE DENIED	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE FEDERAL ISSUES RAISED HERE WERE NOT ARGUED BELOW AND ARE NOT PROPERLY GROUNDS FOR GRANTING CERTIORARI	4
II. THE PETITION SHOULD BE DENIED BECAUSE THE MONTANA SUPREME COURT CORRECTLY CONCLUDED THAT TREATIES WITH FEDERALLY RECOGNIZED TRIBES ARE BINDING THROUGH THE SUPREMACY CLAUSE ON THE STATES, AND UPHELD A REASONABLE STATE REGULATION ESTABLISHING A CLOSED SEASON ON BIG GAME HUNTING FOR NON TRIBAL MEMBERS ON RESERVATIONS TO ACCOMMODATE THE RESERVED HUNTING RIGHTS OF MONTANA TRIBES AND TO CONSERVE BIG GAME SPECIES	7
A. Treaty Rights of Federally Recognized Tribes and Their Members Are Binding Through the Supremacy Clause of the United States Constitution on the State of Montana. U.S. Const., art. VI, cl. 2	7

TABLE OF CONTENTS – Continued

Page

B. The Regulation in Issue Does Not Purport to Create a Trust Relationship, but Only Acknowledges Federal Preemption of State Authority Over On Reservation Hunting Activities of Tribal Members 11

III. IT IS NOT A VIOLATION OF FEDERAL EQUAL PROTECTION LAW FOR A STATE TO CLASSIFY PERSONS BASED ON TRIBAL AFFILIATION AND TO BASE STATE REGULATORY DECISIONS ON WHETHER A PERSON IS A MEMBER OF A TRIBE OR LOCATED ON AN INDIAN RESERVATION, SO LONG AS THAT CLASSIFICATION AND REGULATION ARISE FROM AN ISSUE OF SPECIAL INDIAN CONCERN 13

A. The Classification in Issue Is a Permissible Classification Relating to On Reservation Conduct and Compliments Federal Law Prohibiting Unauthorized Hunting on Indian Trust Lands (18 U.S.C. § 1165)..... 13

B. State Classifications Based on Political Affiliation Are Permissible and Subject Only to the Rational Basis Test When Applied to an Area of Unique Indian Interest. The Challenged Regulation Is, However, Sufficiently Narrowly-Tailored to Pass a More Stringent Test as Well..... 16

IV. THE DECISION BELOW IS NOT CONTRARY TO ANY DECISION OF THIS COURT 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 18, 19

Antoine v. Washington, 420 U.S. 194 (1975) 3, 14

Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084 (E.D. Calif. 2002) 16

Bd. of Control of Flathead, et al. Irrigation Districts v. United States, 832 F.2d 1127 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) 12

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 16

Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665 (10th Cir. 1980) 12

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989) 5, 18

Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982) 12

Confederated Salish and Kootenai Tribes of Flathead Reservation v. K.L. Cool, 750 F. Supp. 446 (1990) ..... *passim*

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., 512 U.S. 61 (1994) 14

Duncan v. Henry, 513 U.S. 364 (1995) 6

Emery v. State Department of Public Health, 950 P.2d 764 (S.C. Mont. 1997) 5

Flynt v. California Gambling Commission, 104 Cal. App. 4th 1125 (2002), *rev. denied*, 2003 Cal. LEXIS 2123 (Cal., Apr. 9, 2003) 16

TABLE OF AUTHORITIES – Continued

Page

Kleppe v. New Mexico, 426 U.S. 529 (1976) 14

Menominee Tribe v. United States, 391 U.S. 404 (1968) ..... *passim*

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1998) ..... *passim*

Missouri v. Holland, 252 U.S. 416 (1920) 14

Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) 3

Montana v. United States, 450 U.S. 544 (1981) ... 3, 10, 11, 13

Morris v. Jones, 329 U.S. 545 (1947) 7

Morton v. Mancari, 417 U.S. 535 (1974) 17, 18

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 14

Northwest Gillnetters Association, et al. v. Gordon Sandison, et al., 628 P.2d 800 (S.C. Wash. 1981) 16

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 6

Puget Sound Gillnetters Association, et al. v. Donald Moos, et al., 92 Wn. 2d 939, 603 P.2d 819 (S.C. Wash. 1977) 3, 10, 16

Rice v. Cayetano, 528 U.S. 495 (2000) 20

Savage v. Jones, 225 U.S. 501 (1912) 8

Schwartz v. State of Texas, 344 U.S. 199 (1952) 8

State ex rel. Nepstad v. Danielson, 427 P.2d 689 (S.C. Mont. 1967) 7, 8, 15, 16, 17

State v. Arthur, 261 P.2d 135 (S.C. Idaho 1953) 9

State v. Horseman, 866 P.2d 1110 (S.C. Mont. 1993) 11

TABLE OF AUTHORITIES – Continued

Page

State v. McClure, 268 P.2d 629 (S.C. Mont. 1954)..7, 8, 9, 12

State v. Stasso, 563 P.2d 562 (S.C. Mont. 1977)..... 7

United States v. Antelope, 430 U.S. 641 (1977).....19

United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876).....14

United States v. Peterson, 121 F. Supp. 2d 1309 (2000).....15

United States v. Washington, 626 F. Supp. 1405 (W.D. Wash. 1981).....*passim*

United States v. Winans, 198 U.S. 371 (1905).....14

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).....*passim*

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997), *cert. denied, Kawerak Reindeer Herders Ass'n v. Williams,* 523 U.S. 1117 (1998).....19

Winters v. United States, 207 U.S. 564 (1908)..... 8

FEDERAL MATERIALS

United States Code
18 U.S.C. § 1165.....15

United States Constitution
Art. II, § 4.....17

Art. VI, cl. 2.....2, 7

OTHER AUTHORITIES

63 C. J., *Treaties,* §§ 27, 28, 29..... 9

TABLE OF AUTHORITIES – Continued

Page

Treaty of Hellgate, July 16, 1855, 12 Stat. 975..... 8

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case. Contrary to Supreme Court Rule 14(g), the statement fails to specify the stage in the proceedings, both in the court of first instance and on appeal, where the federal questions presented to be reviewed were raised. This is because she never raised the federal questions presented here to the state courts.

REASONS THE PETITION SHOULD BE DENIED

1. Petitioner raises claims and alleges facts in the Petition not raised or alleged in the Montana courts. Petitioner may not properly seek review here based on argument and facts not in the record on the ground that the Montana Supreme Court opinion is in conflict with a decision opinion of this Court on a matter of federal law.

2. The Montana Supreme Court correctly concluded that treaties with federally recognized tribes are binding through the Supremacy Clause on the States, and upheld a State regulation establishing a closed season for on reservation big game hunting for nontribal members to accommodate hunting rights of Montana tribes and to conserve big game species.

3. The regulation is a permissible classification based on superior federal treaty rights exempting from state regulatory authority tribal members hunting on their reservations, and therefore it does not violate the Equal

Protection Clause of the Fourteenth Amendment.

4. The decision of the Montana Supreme Court is in conflict neither with any decision of this Court nor with any decision of the court of last resort of another state nor with a decision of a United States Court of Appeals on a matter of federal law.

SUMMARY OF THE ARGUMENT

Petitioner Shook, a nonIndian, contests a Montana regulation closing the Flathead Indian Reservation in Montana to her for big game hunting. Although she alluded to federal law in her briefs below, she articulated primarily state constitutional and administrative law arguments. Procedurally, the petition should be denied because Petitioner failed to preserve any specific federal issues in the Montana courts. Petitioner for the first time here argues the regulation establishes an improper trust relationship between Montana and the tribes, and creates a racial classification violative of Petitioner's federal equal protection rights. Furthermore, in support of these arguments, she raises new facts never before put into the record.

Substantively, it is axiomatic that the federal treaty rights of tribes are binding on the states through the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2. Where a state classification is derived from or mandated by federally protected tribal rights, such a state classification is not a violation of federal equal protection rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658

(1979); *Puget Sound Gillnetters Association, et al. v. Donald Moos, et al.*, 92 Wn. 2d 939, 603 P.2d 819 (S.C. Wash. 1977) (implementing *Passenger Vessel*).

As to the two reservations on which the issue has been specifically litigated in Montana, the state is already required by federal case law to classify for regulatory purposes tribal versus nontribal members *Confederated Salish and Kootenai Tribes of Flathead Reservation v. K. L. Cool*, 750 F. Supp. 446 (1990) *"CSKT v. Cool"* (state may not regulate tribal members within reservation); *Montana v. United States*, 450 U.S. 544 (1981) (may not regulate tribal members on trust or tribal member owned lands).

The Montana Supreme Court correctly held that the challenged regulation is a reasonable and permissible political classification arising from the need to accommodate federally protected hunting rights of the tribes while protecting the big game resource. The regulation creates no benefit for any Indian, but rather extends its state regulatory authority only over nonmembers. Contrary to Petitioner's assertions that a state may not classify persons by tribal membership, Montana must, on a daily basis, classify its citizens by tribal membership to avoid interference with the federally-protected rights of tribal members. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (state may not assess cigarette sales tax on tribal members). The challenged regulation is a means of protecting the big game resource to the extent possible without adversely affecting the on reservation treaty rights of Montana's tribes and their members. *Antoine v. Washington*, 420 U.S. 194 (1975);

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1998).

Montana's decision to incorporate federal treaty rights into corresponding state law does not create or purport to create any trust relationship between the state and the tribes. The Montana Supreme Court ruling correctly held that regulation was a rational state classification of tribal versus nontribal members for on reservation activities, and based on the geographical component of tribal regulatory authority and political affiliation of tribal members.

Petitioner's authority is inapposite. The off reservation racial contracting preferences on which Petitioner relies are irrelevant to this case, involving only reservation conduct. The compelling reasons needed to justify certiorari are not present. The petition for certiorari should be denied.

ARGUMENT

I. THE FEDERAL ISSUES RAISED HERE WERE NOT ARGUED BELOW AND ARE NOT PROPERLY GROUNDS FOR GRANTING CERTIORARI.

Petitioner challenged below a regulation of the Montana Fish and Game Commission that closed Montana Indian reservations to big game hunting by nonmembers of the Tribes absent a cooperative state/tribal agreement regulating same. Petitioner, a nonIndian, was charged in State court with shooting a white-tailed deer on the Flathead Reservation in Western Montana. In support of her motion to dismiss the charges, she challenged the validity of the regulation closing the season as to nonmembers of the Tribes. Below, her arguments seem to have

been based on state administrative law, legislative intent, and state constitutional law. Her first set of articulated reasons in the Montana Supreme Court stated as grounds for dismissal that the challenged regulation:

> 1. . . . violates equal protection, 2. . . . serves no legitimate state interest, 3. . . . contradicts the express statute that request consent of private property owners, 4. . . . is outside the scope of the express purpose of the Commission, 5. the plain language of the statute is void of any express purpose to distinguish between tribal or nontribal member status, and, 6. the legislative history and Commission minutes do not express any justification for how the classification serves to meet the goals of the Commission.

(Shook Appellant's Br., S.C. Mont. at 12-13.)

In contrast to her arguments regarding the scope of legislative delegation to the Fish and Game Commission under state law, citing to *Emery v. State Department of Public Health*, 950 P.2d 764 (S.C. Mont. 1997), and equal protection rights of hunters under state law, the Petition presents for the first time the following questions: whether a state has the same trust relationship with the Tribes as does the federal government; whether strict scrutiny must be applied to the classification in the regulation under *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) and progeny; and whether, based on newly-presented factual allegations not in the record below, the classification establishes a racial classification because, according to new facts alleged herein, all tribal membership in Montana Tribes allegedly contains a significant and unwaivable blood quantum component. (Pet. at i.) Having failed to raise these federal law claims in state court, she

may not rely on them here. *See, e.g.*, *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam) (state court cannot be faulted for only analyzing state law issue where federal claim not raised before the state court).

Only the equal protection argument was made below by Petitioner's generic allegation that the regulation was an impermissible racial classification. The argument that the decision below *de facto* establishes the same trust relationship between Montana and its tribes as the federally recognized tribes have with the federal government is entirely new. Unsupported references to equal protection violations are not sufficiently specific to federal constitutional arguments to put the Respondent reasonably on notice of what, precisely, the Petitioner is arguing. This Court will not address arguments made to this Court for the first time. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995) (Court will not address Oklahoma's argument that the Hayden-Cartwright Act provided necessary express Congressional delegation for the State to tax reservation Indian because the argument was not made below). *Id.* at 456-457.

Similarly, Petitioner's new allegations of fact regarding unwaivable blood quantum requirements for tribal membership are not properly before the Court. (*See* Pet. at 13.) Petitioner offers new facts never made of record, or even alluded to below, including numerous bald allegations of law and fact regarding the Montana Tribal membership laws, citing to various internet sources as her authority. This information is not properly considered here. Not having raised these below, she is precluded from now raising them to this Court.

II. THE PETITION SHOULD BE DENIED BECAUSE THE MONTANA SUPREME COURT CORRECTLY CONCLUDED THAT TREATIES WITH FEDERALLY RECOGNIZED TRIBES ARE BINDING THROUGH THE SUPREMACY CLAUSE ON THE STATES, AND UPHELD A REASONABLE STATE REGULATION ESTABLISHING A CLOSED SEASON ON BIG GAME HUNTING FOR NON TRIBAL MEMBERS ON RESERVATIONS TO ACCOMMODATE THE RESERVED HUNTING RIGHTS OF MONTANA TRIBES AND TO CONSERVE BIG GAME SPECIES.

A. Treaty Rights of Federally Recognized Tribes and Their Members Are Binding Through the Supremacy Clause of the United States Constitution on the State of Montana. U.S. Const., art. VI, cl. 2.

The Montana Supreme Court has long correctly recognized the supremacy of federal law over Indian affairs. *State ex. rel. Nepstad v. Danielson*, 427 P.2d 689 (S.C. Mont. 1967); *State v. McClure*, 268 P.2d 629 (S.C. Mont. 1954); *State v. Stasso*, 563 P.2d 562 (S.C. Mont. 1977). It is an unremarkable proposition that the Tribes' treaty rights are federal rights and binding on the States.

> It is well-settled that the United States Congress may exercise its powers to circumscribe the exercise of state police power by virtue of the Supremacy Clause of the United States Constitution. U.S. Const., Art. VI, Clause 2; *Morris v. Jones*, 329 U.S. 545, 91 L.Ed. 488, 67 S. Ct. 451, 168 A.L.R. 656. A state statute may be effectively "pre-empted" by an act of Congress directly inconsistent with the state statute or by a clear expression of an intention to exclusively occupy a

> limited field encompassing the state statute. *Savage v. Jones*, 225 U.S. 501, 32 S. Ct. 715, 56 L. Ed. 1182; *Schwartz v. State of Texas*, 344 U.S. 199, 73 S. Ct. 232, 97 L. Ed. 231.

Nepstad, 427 P.2d at 691.

These fundamental principals are indisputable, and have been reaffirmed as recently as 1998. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1998). Nor have the rules for interpreting these treaties varied over time. ". . . . [T]reaties are to be interpreted liberally in favor of the Indians, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-676, 61 L. Ed. 2d 823, 99 S. Ct. 3055 (1979), and treaty ambiguities to be resolved in their favor. *Winters v. United States*, 207 U.S. 564, 576-577, 52 L. Ed. 340, 28 S. Ct. 207 (1908)." *Mille Lacs*, 526 at 195.

Petitioner's claim arose from the Flathead Indian Reservation. Its treaty history and legal effect is well established in federal and state law. In *State v. McClure*, 268 P.2d 629 (S.C. Mont. 1954), the State charged two member Indians with possessing an antelope killed during the state closed season, and defendants raised their rights under the 1855 Treaty of Hellgate in defense, arguing the Treaty created federally preemptive rights and the State was without jurisdiction to try them. In affirming that the State could not regulate their reserved treaty hunting rights, the Montana Supreme Court reviewed the history and meaning of the Treaty.

> This treaty was one of a group of eleven treaties negotiated with the Indian nations and tribes of the northwest between December 26, 1854, and July 16, 1855. Most of the treaties were with coast Indians of the territories of Washington

> and Oregon, and with those Indians the prime consideration was in protecting and reserving their fishing rights and grounds which provided their major food supply. However, the Flathead and other prairie Indian nations' primary interest was to protect and reserve their hunting rights and grounds which provided their major food and clothing. The form of the treaty, however, was almost identical in each instance. . . . The negotiations and proceedings and council held by Governor Stevens representing the President of the United States, and the Chiefs of the Flathead, Pend d'Oreille and Kootenai tribes, were held at Hell Gate in the Bitterroot Valley, Washington Territory, commencing July 7th and concluded July 16, 1855. This treaty with the Flathead Nation was ratified by the Senate of the United States March 8, 1859, and proclaimed by President James Buchanan April 18, 1859, 12 Stat. 975, 979. By this treaty the Flathead Indian Reservation was established and has continuously so existed under the direction of the superintendent thereof to this date. Such a treaty solemnly entered into is a contract between two independent nations, in this case, the United States of America and the Flathead Nation, and such a treaty is regarded as a part of the law of the state as much as the state's own laws and Constitution and is effective and binding on state legislatures. Such a treaty is superior to the reserved powers of the state, including the police power. 63 C. J., Treaties, secs. 27, 28, 29, pp. 844, 845. Compare *State of Missouri v. Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984, and cases therein cited; *State v. Arthur*, 74 Idaho 251, 261 P.2d 135.

McClure, 268 P.2d 629, 631.

The regulation in issue permissibly classifies nonmembers as a distinct legal class for on reservation conduct. This is consistent with *Montana v. United States*, 450 U.S. 544 (1981), as well as *Confederated Salish and Kootenai Tribes of Flathead Reservation v. K.L. Cool*, 750 F. Supp. 446 (1990). Petitioner's goal is apparently to assure that nonmembers and members are treated alike with respect to on reservation activity. This Court has, however, already foreclosed that possibility. Montana does not have regulatory jurisdiction over tribal members hunting on their reservations, and so has protected the big game resources in the only way it can – by regulating nonmember conduct. *Confederated Salish and Kootenai Tribes of Flathead Reservation v. K.L. Cool*, 750 F. Supp. 446 (1990). *See United States v. Washington*, 626 F. Supp. 1405 (1981) (state regulation of tribal take enjoined – state may regulate nonmembers only); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

As the Washington Supreme Court recently pointed out in one of the difficult cases involving state implementation of conservation regulations while respecting tribal treaty rights, "We wish to point out here the obvious correlative impact of the supremacy clause on state legislation. Any attempt to limit by statute or administrative regulation the effect of the treaties on the state fisheries cannot survive the superior force of federal law protecting the signatory tribes' right. . . . " *Puget Sound Gillnetters v. Moos, et al.*, 603 P.2d 819, 826 (S.C. Wash. 1977).

B. The Regulation in Issue Does Not Purport to Create a Trust Relationship, but Rather Only Acknowledges Federal Preemption of State Authority Over On Reservation Hunting Activities of Tribal Members.

Petitioner correctly notes that the United States Constitution does not impose on States the same trust relationship that the federal government has with tribes, and that Congressional authority under the Indian Commerce Clause is plenary and has no corollary in state authority. (Pet. at 6-7.) She then argues that the Montana Supreme Court's interpretation of the Montana Constitution is erroneous. The question of whether the court's interpretation of the Montana Constitution is correct is not a federal question before this Court. (Pet. at i.)

Montana concedes that the federal government has plenary authority over Indian affairs, and that the United States necessarily has a unique legal relationship with tribes. The court's decision however, does not purport to create a state/tribal trust relationship and the regulation creates no special rights for Indians.

Contrary to Petitioner's claim that the regulation results in "singling out tribal Indians," Pet. at. 11, the regulation in issue does not affect Indians at all – because federal law preempts state regulation of member hunting on reservations. *Montana v. United States* at 563, *CSKT v. Cool*, 750 F. Supp. at 451. While the extent of off reservation hunting rights varies among the Montana Tribes, *see State v. Horseman*, 866 P.2d 1110 (S.C. Mont. 1993), there is no question that tribal regulatory authority has a significant geographical component, and that state regulatory authority over on reservation hunting activities of members is generally preempted. *Menominee Tribe v.*

United States, 391 U.S. 404 (1968); *Cheyenne Arapahoe Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

Petitioner implicitly argues that because Montana is asserting regulatory authority only over nonmembers of the Tribes, this is tantamount to creating a trust relationship. The regulation, however, merely acknowledges that on reservations, tribal members are generally free of state hunting regulations, and consequently the State can further big game preservation only by restricting hunting by nonmembers. As the federal district court in Montana has noted:

> The Montana Supreme Court acknowledged this exclusive right of the Tribes to hunt and fish within the exterior boundaries of the Reservation in *State v. McClure*, 127 Mont. 534, 268 P.2d 629 (1954), and the Court of Appeals for the Ninth Circuit also recognized the importance of these particular treaty rights in *Bd. of Control of Flathead, et al. Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007, 108 S. Ct. 1732, 100 L. Ed. 2d 196 (1988), and in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977, 74 L. Ed. 2d 291, 103 S. Ct. 314 (1982).

Confederated Salish and Kootenai Tribes of Flathead Reservation v. K. L. Cool, 750 F. Supp. at 448 (1990).

Petitioner's argument fails to present the necessary compelling reasons for granting certiorari, and the Petition should be denied.

III. IT IS NOT A VIOLATION OF FEDERAL EQUAL PROTECTION LAW FOR A STATE TO CLASSIFY PERSONS BASED ON TRIBAL AFFILIATION AND TO BASE STATE REGULATORY DECISIONS ON WHETHER A PERSON IS A MEMBER OF A TRIBE OR LOCATED ON AN INDIAN RESERVATION, SO LONG AS THAT CLASSIFICATION AND REGULATION ARISE FROM AN ISSUE OF SPECIAL INDIAN CONCERN.

A. The Classification in Issue Is a Permissible Classification Relating to On Reservation Conduct and Compliments Federal Law Prohibiting Unauthorized Hunting on Indian Trust Lands (18 U.S.C. § 1165).

The regulation in issue simply closes the federally recognized Indian reservations in Montana to nonmembers' big game hunting unless there is a state/tribal cooperative agreement in effect to regulate it. Given the complexity and expense of litigation to resolve questions of hunting and fishing regulation on reservations in Montana, *see, e.g.*, *Montana v. United States*, 450 U.S. 544 (1981) (regarding jurisdiction on the Crow Reservation and the Big Horn River); *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. K.L. Cool*, 750 F. Supp. 446 (1990) (Flathead Tribes assert exclusive hunting and fishing regulatory authority within reservation, Court rejects *Montana v. United States* as controlling, refers to Tribes' "exclusive" rights to regulate, urges continuation of state/tribal negotiations and stays case) this is a rational approach to the problem.

In *Mille Lacs*, this Court held that Indian reserved hunting rights do not eliminate the correlative rights of

states to regulate hunting so long as the state regulation does not violate the reserved rights of the tribes.

> As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 61 L. Ed. 2d 823, 99 S. Ct. 3055 (1979); *see also Antoine v. Washington*, 420 U.S. 194, 43 L. Ed. 2d 129, 95 S. Ct. 944 (1975). Rather, Indian treaty rights can coexist with state management of natural resources. Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making. U.S. Const., Art. VI, cl. 2. *See, e.g., Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920); *Kleppe v. New Mexico*, 426 U.S. 529, 49 L. Ed. 2d 34, 96 S. Ct. 2285 (1976); *United States v. Winans*, 198 U.S. at 382-384; *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 23 L. Ed. 846 (1876). *See also Menominee Tribe v. United States, supra*, at 411, n.12.

Mille Lacs, 526 U.S. at 204.

Petitioner's reliance on the preemptive reach of Congressional action, and the difficulty in determining in each instance whether Congress has, in fact, preempted state regulation involving Indians, is irrelevant. *Compare New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344-45 (1983) (state regulation of nonIndian hunters preempted) with *Department of Taxation and Finance of New*

York v. Milhelm Attea & Bros., 512 U.S. 61, 64 (1994) (state taxation of sales to nonIndians not preempted by Indian trader statutes). When Congress establishes a reservation, implied tribal hunting rights are included. *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968).

The Montana Tribes unquestionably have some reserved hunting rights and regulatory authority, although the scope and extent of the different tribes' rights vary greatly, *e.g.*, *United States v. Peterson*, 121 F. Supp. 2d 1309, 317-21 (D. Mont. 2000) (Blackfeet reserved rights in the ceded strip of Glacier National Park clearly reserved by Treaty but later clearly Congressionally abrogated); *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. K.L. Cool*, 750 F. Supp. 446 (D. Mont. 1990) (referring to exclusive hunting and fishing rights of Stevens Treaty Tribes). The State has by regulation continued to assert its authority over non tribal members and the regulation was properly upheld in *State ex rel. Nepstad v. Danielson*, 427 P.2d 689, 692-93 (S.C. Mont. 1967), where the court examined the relationship between federal laws prohibiting non tribal hunting on trust lands, and state conservation needs. As the federal statute prohibited only unauthorized hunting on trust land, the court found the regulation a permissible exercise of state authority and not preempted by 18 U.S.C. § 1165.

The states with Indian reservations within their borders must exercise their sovereignty ever mindful of potential litigation that might derail an otherwise perfect regulatory scheme because of interference with any one of a plethora of federally-protected tribal rights. *See, e.g.*, *Puget Sound Gillnetters Ass'n v. Moos*, 603 P.2d 819 (S.C. Wash. 1977). States can, and in many cases must, in areas

of special Indian concern, such as on reservation activities, classify persons by their Indian status, *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1998); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *Flynt v. California Gambling Commission*, 104 Cal. App. 4th 1125 (2002), *rev. denied*, 2003 Cal. LEXIS 2123 (Cal., Apr. 9, 2003); *Puget Sound Gillnetters*, at 824-25; *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Calif. 2002).

B. State Classifications Based on Political Affiliation Are Permissible and Subject Only to the Rational Basis Test When Applied to an Area of Unique Indian Interest. The Challenged Regulation Is, However, Sufficiently Narrowly-Tailored to Pass a More Stringent Test as Well.

When regulating hunting in coordination with tribal rights, states must classify persons on the basis of whether they are members of the class with the reserved rights. *State ex rel. Nepstad v. Danielson*, 427 P.2d 689 (S.C. Mont. 1967). Such classifications are mandated for states to comply with complex regulatory choices affecting allocation of take and preservation of species where regulatory authority must be shared with Tribes whose reserved rights survive statehood and reservation creation. *Northwest Gillnetters Association, et al. v. Gordon Sandison, et al.*, 628 P.2d 800, 802 (S.C. Wash. 1981). In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court held classification based on tribal membership is permissible and sometimes mandated based on "peculiar semi-sovereign and constitutionally recognized status of Indians." *See Passenger Vessel*, 443 U.S. at 684; *Puget*

Sound Gillnetters Association, et al. v. Donald Moos, et al., 603 P.2d at 824-25 (upholding state regulations classifying fishermen and allocating take). There is no question that as a matter of federal law, Montana's jurisdiction over hunters depends on the location of the hunting and the tribal membership of the hunter. Because of the state's inability to regulate big game predation by Indians on reservations, it has taken a conservation measure to protect the big game by simply putting all reservations off limits to nonmembers in the absence of a cooperative agreement assuring a reasonable take. The Montana Supreme Court upheld this approach in *State ex. rel. Nepstad v. Danielson*, 427 P.2d 689 (S.C. Mont. 1967). It was properly upheld again below.

The Montana Supreme Court's opinion below noted the rule from *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974) that, where relating to the special relationship between the federal government and the tribes, classifications based on tribal membership were permissible classifications that, when relating to special issues of Indian concern, were reviewed under the rational basis test. Pet. App. 6-7. The Court opined, "Consequently, federal Indian law regarding the rights of Indians is binding on the state. Therefore, the state equal protection guarantee under Article II, Section 4, must allow for state classifications based on tribal membership if those classifications can rationally be tied to the fulfillment of the unique federal, and consequent state, obligation toward Indians." Pet. App. 7. Montana has, based in part on controlling federal law and in part on Montana constitutional and statutory law, permissibly incorporated into state law the rule of *Morton v. Mancari*, 417 U.S. 535 (1974), that classifications based on membership in federally recognized tribes

are to be upheld when they are related to the special federal and state obligations to tribal members, here, arising from the reserved hunting rights of the Tribes. The Court itself noted the parameters that assure the narrow tailoring of the rule: that the area is one of special Indian concern and that the regulation be rationally related to the fulfillment of federal obligations to Tribes and their members. *Id.* As thus stated, it comports with federal equal protection law.

IV. THE DECISION BELOW IS NOT CONTRARY TO ANY DECISION OF THIS COURT.

The Court decision below does not conflict with any relevant decision of this Court. This Court, has repeatedly reaffirmed the rule of *Mancari*, where special Indian interests are concerned. Petitioner cites numerous cases involving off reservation employment or contractor preferences for racial groups as authority for the proposition that this on reservation classification is improper. None of these cases involving racial preferences are apposite. *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), both involved categorical racial preferences to state or city contracting awards. Both were found to be subject to strict scrutiny and insufficiently narrowly-tailored to remedy a past specific harm to survive that exacting test. Neither, of course, is relevant to the question herein, which involves not the grant of a special state privilege to a racial group, but rather a hunting regulation applied only to on reservation conduct of the only class of individuals the state unquestionably has jurisdiction over for

on reservation activities: nonmembers. Such regulation is fully consistent with this Court's relevant opinions.

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997), *cert. den. sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998), is not to the contrary. So long as reasonably tied to issues historically related to Indian status or culture, the classifications of enrolled tribal members based on their enrollment is political, not racial, and thus not subject to strict scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200. Indeed, *Babbitt* fully supports the result below.

> Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641, 646, 51 L. Ed. 2d 701, 97 S. Ct. 1395 (1977). As "a separate people," Indians have a right to expect some special protection for their land, political institutions (whether tribes or native villages), and culture.

Babbitt, 115 F.3d at 664. There, the basis for the challenge was that the reindeer industry was foreign to Alaska Indians, and therefore not an area of special Indian concern. There is no doubt, however, that hunting big game on established Indian reservations is an area of special Indian concern, as all of Montana's Indians have on reservation rights to regulate at least their members on trust lands. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Thus, even under the more restrictive scrutiny *Babbitt* would call for, the challenged regulation would

pass. Nor is *Rice v. Cayetano*, 528 U.S. 495 (2000) relevant, as that case involved both voting rights and native Hawaiians with no trust relationship or treaty with the United States.

CONCLUSION

Petitioner has presented no compelling argument justifying the grant of certiorari. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

SANDRA SHOOK,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Montana

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT IN REPLY	1
I. THE ISSUES PRESENTED BY MS. SHOOK ARE PROPERLY BEFORE THIS COURT	1
A. THE MONTANA SUPREME COURT'S DECISION ESTABLISHED A *DE FACTO* "TRUST RELATIONSHIP" BETWEEN MONTANA AND INDIAN TRIBES	1
B. THE MONTANA HUNTING REGULATION CREATES A RACIAL CLASSIFICATION THAT IS SUBJECT TO "STRICT SCRUTINY"	2
II. MONTANA AND *AMICUS* ATTEMPT TO CONFUSE THE ISSUES	5
A. THE TREATY DOES NOT PROVIDE TRIBAL MEMBERS THE EXCLUSIVE RIGHT TO HUNT WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION	5
B. THE MONTANA HUNTING REGULATION RESTRICTS HUNTING ON PRIVATELY OWNED NON-INDIAN FEE LAND	6
C. MS. SHOOK DOES NOT ARGUE THAT HUNTING IS A CONSTITUTIONALLY PROTECTED RIGHT	7
III. THE MONTANA SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND THE NINTH CIRCUIT	8

TABLE OF CONTENTS – Continued

Page

A. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH *CROSON* AND *ADARAND*... 8

B. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH *RICE v. CAYETANO*..... 8

C. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT*.... 9

CONCLUSION..... 10

APPENDIX. Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (as amended), art. II, §§ 2-6.....App. 1

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).....3, 8

Atkinson Trading Company, Inc. v. Shirley, 532 U.S. 645 (2001).....9, 10

Buckley v. Valeo, 424 U.S. 1 (1976)..... 3

Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182 (1945) 1

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989)..... 8

Emery v. State of Montana, 580 P.2d 445 (1978)..... 4

Geiger v. Pierce, 758 P.2d 279 (Mont. 1988).....5, 8

Jenkins v. Georgia, 418 U.S. 153 (1974)..... 3

Montana v. United States, 450 U.S. 544 (1981) 9, 10

Morton v. Mancari, 417 U.S. 535 (1974).....3, 4, 9, 10

Oregon v. Kennedy, 456 U.S., 667 (1982)..... 4

Raley v. Ohio, 360 U.S. 423 (1959) 3

Rice v. Cayetano, 528 U.S. 495 (2000) 8, 9

State v. Shook, 313 Mont. 347, __ P.2d __ (Mont. 2002).....3, 4, 7, 8

State v. Stasso, 563 P.2d 562 (Mont. 1977).....6, 7

United States v. Antelope, 430 U.S. 641 (1977)..... 3

United States v. Sandoval, 231 U.S. 28 (1913)..... 2

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979)..... 2

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997).....9, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 1165 ..... 6, 7

25 U.S.C. § 500, *et seq.*, Reindeer Act of 1937 9

28 U.S.C. § 1257(a) 2

ARGUMENT IN REPLY

I. THE ISSUES PRESENTED BY MS. SHOOK ARE PROPERLY BEFORE THIS COURT.

A. THE MONTANA SUPREME COURT'S DECISION ESTABLISHED A *DE FACTO* "TRUST RELATIONSHIP" BETWEEN MONTANA AND INDIAN TRIBES.

Montana argues that whether it has the same "trust relationship" with American Indians as does the federal government is an "entirely new" issue and, thus, is not properly before this Court. Resp. 6. This argument ignores, however, that the holding of the Montana Supreme Court established a *de facto* "trust relationship" between Montana and the several Indian tribes within its borders. Pet. App. 7. That holding and the constitutional issue that it raises are now properly before this Court as grounds for granting *certiorari*. *See*, *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-186 (1945) (there is no need to inquire how and when a question presented was raised when such question appears to have been decided by a state court of last resort); *see also*, Pet. 5, 6-11.

The Montana hunting regulation in question allows tribal members to hunt wildlife within the exterior boundaries of an Indian reservation while denying that same right to non-tribal members who own fee property within those boundaries. Pet. 2. The Montana Supreme Court held that this regulation, which differentiates between similarly situated persons based on their race, is essential to "the fulfillment of the unique federal, *and consequently state, obligation* toward Indians." Pet. App. 7. (emphasis added). Thus, the holding of the Montana Supreme Court established a *de facto* "trust relationship" between Montana and the several Indian tribes within its borders, which holding is in direct conflict with decisions of this Court.

"States do not enjoy [the] same unique relationship with Indians" as does the federal government. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979). Moreover, only Congress may enact legislation "singling out tribal Indians." *Id.*; *see also*, *United States v. Sandoval*, 231 U.S. 28, 45-48 (1913) (the power to enact laws for the benefit and protection of Indian tribes rests with Congress). Furthermore, although this Court has held that a special trust relationship exists between the federal government and Indian tribes, this Court has never reached that conclusion regarding the states.

Accordingly, the decision of the Montana Supreme Court that Montana has a duty to fulfill "the unique federal, and consequently state, obligation towards Indians," thereby establishing a *de facto* "trust relationship" between Montana and the several Indian tribes within its borders, creates a proper issue for the exercise of *certiorari* jurisdiction by this Court under 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of *certiorari* where the validity . . . [ ] *of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution*, treaties, or laws of the United States[.]

(Emphasis added).

B. THE MONTANA HUNTING REGULATION CREATES A RACIAL CLASSIFICATION THAT IS SUBJECT TO "STRICT SCRUTINY."

Montana argues that whether "strict scrutiny" must be applied to the Montana hunting regulation in determining its constitutionality is an issue raised for the first time and, therefore, is not properly before this Court. Resp. 5. Montana also argues that "[u]nsupported references to

equal protection violations are not sufficiently specific to federal constitutional arguments to put [Montana] reasonably on notice of what [] the Petitioner is arguing." Resp. 6. Montana's arguments are disingenuous.

Whether "strict scrutiny" or the less stringent rational basis standard of review must be applied to the Montana hunting regulation was considered and disposed of by the Montana Supreme Court after Ms. Shook properly presented that issue to that court. Pet. 5, 8. In fact, Montana itself, relying on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), argued below that "state or federal laws classifying individuals based on their membership in tribal governments are political classifications, not racial classifications, and are thus not subject to strict scrutiny, but are only subject to the rational basis test." Brief of Respondent at 15, *State v. Shook*, 313 Mont. 347, __ P.2d __ (Mont. 2002) (No. 99-608). In adopting Montana's argument, the Montana Supreme Court held that "federal Indian law" is binding on the states, which required Montana to defer to this Court's decision in *Mancari*. Pet. App. 7. Thus, because the Montana Supreme Court considered and disposed of Ms. Shook's federal constitutional claim, "[t]here can be no question as to [its] proper presentation" before this Court. *Raley v. Ohio*, 360 U.S. 423, 436-437 (1959); *see also, Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (an issue is properly before this Court if the state court reached and decided it).

In ruling against Ms. Shook, the Montana Supreme Court relied on the equal protection analysis of this Court in *Mancari* and *United States v. Antelope*, 430 U.S. 641 (1977). Pet. App. 6. Although these cases involved the equal protection component of the Due Process Clause of the Fifth Amendment, it has long been settled that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *see also, Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995). Similarly, the equal protection provisions of the United

States Constitution and the Montana Constitution are afforded equivalent analysis. *See*, *Emery v. State of Montana*, 580 P.2d 445, 449 (1978). Because the Montana Supreme Court's treatment of the equal protection issue was guided almost entirely by "decisions of this Court" and because "the [Montana Supreme Court] relied to the extent it did on federal grounds[,] [this Court is] require[d] to reach the merits." *Oregon v. Kennedy*, 456 U.S, 667, 671 (1982). Moreover, Montana had sufficient notice that, in resolving Ms. Shook's case, the Montana Supreme Court would be required to apply the equal protection guarantees of the United States Constitution.[1]

Montana, without providing any authority, also argues that Ms. Shook's contentions involving "unwaivable blood quantum requirements for tribal membership" are not properly before this Court. Resp. 6. Montana's argument is without merit. Ms. Shook contended that the Montana hunting regulation created a racial classification, not a political classification, in part because it distinguished between tribal and non-tribal members, a distinction prefaced on a requisite degree of American Indian blood. Pet. 13, 18.

The distinction between a racial and political classification was the very issue addressed and decided by the Montana Supreme Court. Pet. App. 4-8. Although the Montana Supreme Court, relying on this Court's decision in *Mancari*, ruled that the Montana hunting regulation created a political, not racial, classification, implicit in that ruling is that tribal membership requires a certain

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[1] The equal protection requirements of the United States and Montana Constitutions were raised and addressed on numerous occasions below by both parties. *See,* Defendant's Motion to Dismiss at 7, *State v. Shook*, D.C. Mont. (No. 98-08); Defendant's Reply Brief at 3-11, D.C. Mont. (No. 98-08); Brief of Appellant at 12, 24, 27, *State v. Shook*, 313 Mont. 347, __ P.2d __ (Mont. 2002) (No. 99-608); Brief of Respondent at 15, *Shook* (No. 99-608). *See also*, Pet. App. 4-10, 23-24.

blood quantum. Pet. App. 4-8. Moreover, it is well known throughout the Montana judicial system that membership in the Confederated Salish and Kootenai Tribes requires a certain blood quantum. *See, e.g., Geiger v. Pierce*, 758 P.2d 279, 282 (Mont. 1988) (concurring opinion) ("[t]he Tribal Council of the Confederated Salish and Kootenai Tribes establishes the criteria for enrollment in said Tribe based on a quantum of Indian blood as determined by said Tribal Council"); Pet. App. 23. Thus, whether the blood quantum requirements of tribal membership render Montana's hunting regulation a racial, not a political, classification subject to strict scrutiny is properly before this Court and a proper ground for granting *certiorari*.[2]

II. MONTANA AND *AMICUS* ATTEMPT TO CONFUSE THE ISSUES.

A. THE TREATY DOES NOT PROVIDE TRIBAL MEMBERS THE EXCLUSIVE RIGHT TO HUNT WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION.

Montana's argument that Ms. Shook's Petition should be denied because treaty rights of federally recognized tribes and their members are binding on the states through the Supremacy Clause of the United States Constitution is a "red herring." Resp. 7. Ms. Shook does

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[2] Both Montana and *Amicus* criticize Ms. Shook for failing to introduce specific evidence of the blood quantum requirements for tribal membership on the Flathead Reservation. Resp. 6; *Amicus* 2-3. However, neither Montana nor *Amicus* expressly disputes the fact that tribal membership requires a certain blood quantum. *Id.* Their failure to dispute this fact is not surprising considering that the Constitution of the Confederated Salish and Kootenai Tribes expressly sets forth that membership in its Tribe is dependent on a specific blood quantum. *See*, Reply App. 1-2.

not contest whether treaty rights are federal rights and therefore binding on the states. Rather, Ms. Shook argues that no Indian treaty, including the Treaty with the Flathead Indians, creates a "unique relationship" between Montana and Indian tribes so as to establish a trust relationship like that between the federal government and American Indians. Pet. 9-11.

In fact, the Flathead Treaty of 1855 did not establish, nor could it even have contemplated, a trust relationship between Montana and the several Indian tribes involved for the simple reason that the State of Montana did not exist in 1855. Pet. 9-11. Furthermore, the Treaty does not reserve for tribal members the exclusive right to hunt on non-Indian fee land within the exterior boundaries of the Flathead Reservation. Pet. 10. Nor does the Treaty require Montana to accommodate any hunting privileges reserved to the Indians to the exclusion of non-tribal members who own non-Indian fee land within the exterior boundaries of the Flathead Reservation. Pet. 10. The Treaty reserves only the privilege of the tribes to hunt within the exterior boundaries of the reservation on lands not owned and occupied by private parties "under possessory rights or patent or otherwise appropriated to private ownership." *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977).

B. THE MONTANA HUNTING REGULATION RESTRICTS HUNTING ON PRIVATELY OWNED NON-INDIAN FEE LAND.

Montana's attempt to analogize the racial classification based on tribal membership created by the Montana hunting regulation to federal law prohibiting unauthorized hunting on Indian trust lands under 18 U.S.C. § 1165 is disingenuous. Resp. 13, 15. The Montana regulation, which limits big game hunting privileges on Indian Reservations to tribal members, denies non-tribal members who own fee property within the exterior boundaries of a reservation the ability to hunt because of their race. The unconstitutionally regulated conduct that Ms. Shook

contests does not occur on the reservation, but instead occurs on privately owned non-Indian fee land within the reservation's exterior boundaries. Privately owned non-Indian fee land is not Indian trust land nor is it reservation land, even though it may be within the exterior boundaries of a reservation. *See*, *Stasso*, 563 P.2d at 565.

Moreover, 18 U.S.C. § 1165 does not apply to privately owned fee land within a reservation such as the land at issue in this case. That statute provides that "[w]hoever, without lawful authority of permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe" is guilty of criminal conduct. 18 U.S.C. § 1165. This statute, which applies only to tribal lands, creates a federal crime of trespass. In fact, Montana conceded below that "[c]learly, no tribal lands within the statutory definition are in issue [in Ms. Shook's case]" and that "[18 U.S.C. § 1165] has nothing to do with the case below or on appeal." Brief of Respondent at 21, *Shook* (No. 99-608).

C. MS. SHOOK DOES NOT ARGUE THAT HUNTING IS A CONSTITUTIONALLY PROTECTED RIGHT.

Amicus argues that Ms. Shook presumes that "hunting big game under Montana law is a Constitutionally protected right." *Amicus* 11. This argument is another "red herring." Ms. Shook's contention that the Montana hunting regulation must be subjected to "strict scrutiny" equal protection analysis is not premised on Montana's alleged denial of a fundamental right, but rather on Montana's use of a suspect classification, *i.e.*, race. Pet. 13-14, 20, 23. Indeed, from "the outset [Ms. Shook] noted that [the Montana hunting regulation] established a suspect class subject to strict scrutiny review." Brief of Appellant at 25, *Shook* (No. 99-608). Moreover, Montana acknowledged that "Shook does not appear to argue that hunting is a

fundamental right[.]" Brief of Respondent at 18, *Shook* (No. 99-608).

III. THE MONTANA SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND THE NINTH CIRCUIT.

A. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH *CROSON* AND *ADARAND*.

The Montana Supreme Court held that the Montana hunting regulation and the classifications it created are "constitutional under equal protection requirements because the distinction is political rather than racial." Pet. App. 5. Consequently, the Montana Supreme Court subjected the regulation to rational basis review instead of the heightened "strict scrutiny" standard. Pet. App. 6-7. However, it is well established that when a state treats similarly situated persons differently because of their race, strict scrutiny must be applied. *See, City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 492-97 (1989); *Adarand*, 515 U.S. 200, 227. Montana's hunting regulation treats non-tribal member owners of non-Indian fee land differently from similarly situated tribal members of the Flathead Tribe, which Tribe determines membership based on a quantum of Indian blood. *See, e.g., Geiger*, 758 P.2d at 282 (*concurring opinion*). Accordingly, the Montana hunting regulation creates a racial classification that must be scrutinized strictly. *See, Croson*, 488 U.S. at 490; *Adarand*, 515 U.S. at 227; Pet. 11-16.

B. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH *RICE v. CAYETANO*.

That *Rice v. Cayetano*, 528 U.S. 495 (2000), involved voting rights and Native Hawaiians does not render it

irrelevant to Ms. Shook's case. Resp. 20; *Amicus* 7. In *Cayetano*, this Court recognized the limited reach of *Mancari* because it turned on the issue of tribal self-governance and the unique nature of the Bureau of Indian Affairs ("BIA"). *Cayetano*, 528 U.S. at 518. Thus, in order for the Montana Supreme Court to adhere properly to *Mancari*, it would have had to assume that Montana has the same "*sui generis*" relationship with Indian tribes as does Congress and the BIA. This is not the case. Montana does not have a "trust relationship" with American Indians. Moreover, Ms. Shook's ability to hunt on non-Indian fee land does not interfere with any tribal regulation or established treaty, nor with tribal self-governance. *See, Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 651 (2001); *Montana v. United States*, 450 U.S. 544, 564-66 (1981). Accordingly, the Montana Supreme Court's decision is in direct conflict with this Court's decision in *Cayetano*.

C. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT*.

In *Williams v. Babbitt*, the Ninth Circuit Court of Appeals, applying strict scrutiny under the guidance of this Court's decision in *Adarand*, determined that the Interior Board of Indian Appeals' interpretation of the Reindeer Act of 1937, 25 U.S.C. § 500, *et seq.*, raised "grave" constitutional concerns under equal protection guarantees. 115 F.3d 657, 665-66 (9th Cir. 1997). Furthermore, the Ninth Circuit held that this Court's decision in *Mancari* could constitutionally "shield[ ] only those statutes that affect uniquely Indian interests." *Id.* at 665. Montana's and *Amicus*' argument that the decision of the Montana Supreme Court is not in conflict with *Williams* rests on their erroneous view that hunting big game on Indian reservations is an area of special Indian concern. Resp. 19; *Amicus* 15.

This case does not involve either "uniquely Indian interests" or "special Indian concerns," such as tribal self-government, that warrant a lesser standard of review such as that applied in *Mancari*. Instead, this case involves a blanket preference for Indians unrelated to "uniquely Indian interests." *See*, *Williams*, 115 F.3d at 663-66. As applied to Ms. Shook, the Montana hunting regulation does not affect reservation land, but rather only non-Indian fee land. In addition, the Indians of the Flathead Reservation do not possess an exclusive right to hunt on all lands within the exterior boundaries of the reservation. Pet. App. 34-35. Moreover, this Court has already held that "hunting [ ] on non-Indian fee land [does] not 'imperil the subsistence or welfare of [a] [t]ribe[,]" nor threaten the political or economic security of a tribe. *Atkinson Trading Company, Inc.*, 532 U.S. at 651; *see also*, *Montana*, 450 U.S. at 564-66. Accordingly, the Montana Supreme Court should have applied a "strict scrutiny" equal protection analysis and found that the Montana hunting regulation was not "shielded" by this Court's decision in *Mancari*.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition.

Respectfully submitted,

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Dated: August 8, 2003

CONSTITUTION AND BYLAWS

Part 1

Constitution

Of the Confederated Salish and Kootenai Tribes

Of the Flathead Reservation, as Amended

* * *

Article II

Membership

* * *

Section 2. Present Membership. Membership in the Tribes on and after the date of the adoption of this amendment shall consist of all living persons whose names appear on the per capita roll of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, as prepared for the per capita distribution as shown on the per capita roll paid in February 1959 together with all children of such members, born too late to be included on such per capita roll and prior to the effective date of this section who possess one-fourth (1/4) or more Salish or Kootenai Blood or both and are born to a member of the Confederated Tribes of the Flathead Indian Reservation. Subject to review by the Secretary of the Interior, the Tribal Council shall make any necessary corrections in this 1959 membership roll so that no one eligible for membership under prior constitutional provisions shall be excluded therefrom.

Section 3. Future Membership. Future membership may be regulated from time to time by ordinance of the Confederated Tribes subject to review by the Secretary of the Interior. Until and unless an ordinance is adopted any person shall be enrolled as a member who shall (a) apply,

or have application made on his behalf, establishing eligibility under this provision; (b) show that he is a natural child of a member of the Confederated Tribes; (c) that he possesses one-quarter (1/4) degree or more blood of the Salish and Kootenai Tribes or both, of the Flathead Indian Reservation, Montana; (d) is not enrolled on some other reservation.

Section 4. Adoption. The Tribal Council shall have the power to enact and promulgate ordinances, subject to review by the Secretary of the Interior, governing the adoption of persons as members of the Confederated Salish and Kootenai Tribes.

Section 5. Loss of Membership. Membership in the Confederated Tribes may be lost (1) by resignation in writing to the Tribal Council; (2) by enrollment of the member with another Indian tribe; (3) by establishing a legal residence in a foreign country; (4) upon proof of lack of eligibility for enrollment, or fraud in obtaining enrollment, with due notice and opportunity to be heard and defend before the Tribal Council, subject to appeal to the Secretary of the Interior, whose decision shall be confined to the record made in such proceeding which, if supported by substantial evidence, shall be binding.

Section 6. Definitions. Wherever the term "Indian Blood" shall have been used herein or in tribal ordinances, unless the context shall require a different meaning, it shall be determined to mean the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation.

* * *

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(3)

No. 02-1658

In The Supreme Court of the United States

SANDRA SHOOK,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF *AMICUS CURIAE* OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The Confederated Salish and Kootenai Tribes note that the QUESTIONS PRESENTED in the Petition (Pet. at i) are based upon misstatements of fact and law and restyle them as follows:

1. Is a Montana state hunting regulation that prohibits all persons who are not enrolled members of an Indian tribe, Indian and non-Indian alike, from hunting on that Tribe's Indian Reservation based upon a political or a racial classification?

2. Is big game hunting under Montana law a privilege, the regulation of which is subject to a rational basis test, or a right, the regulation of which is subject to strict scrutiny?

LIST OF PARTIES

Petitioner: Ms. Sandra Shook was Defendant in the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sanders, and Appellant before the Supreme Court of the State of Montana.

Respondent: The State of Montana was Plaintiff in the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sanders, and Respondent before the Supreme Court of the State of Montana.

Amicus Curiae: The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana. The Confederated Salish and Kootenai Tribes were not a party at the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sanders, but were Amicus Curiae before the Supreme Court of the State of Montana.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTERESTS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES	1
1. The Controversy	1
2. The Confederated Salish and Kootenai Tribes	2
3. Relations Between Montana and the CSKT	3
REASONS TO DENY CERTIORARI	4
I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MONTANA SUPREME COURT AND THE DECISIONS OF THIS COURT	4
A. THE MONTANA SUPREME COURT DECISION IS IN HARMONY WITH DECISIONS OF THIS COURT HOLDING THAT MEMBERSHIP IN AN INDIAN TRIBE IS A POLITICAL, NOT RACIAL, CLASSIFICATION	4
B. PETITIONER MISAPPREHENDS THE CONSTITUTIONAL STATUS OF A HUNTING PRIVILEGE UNDER MONTANA LAW	11
C. THE MONTANA SUPREME COURT PROPERLY UPHELD ITS SOLEMN OBLIGATION TO FOLLOW FEDERAL LAW	13

TABLE OF CONTENTS – Continued

Page

II. THERE IS NO CONFLICT BETWEEN THE MONTANA SUPREME COURT DECISION AND THE NINTH CIRCUIT COURT OF APPEALS DECISION IN *WILLIAMS v. BABBITT* 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 8, 9

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) 14

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978) 11, 12

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 9

Confederated Salish and Kootenai Tribes v. State of Montana, 750 F.Supp. 446 (D. Mont. 1990) 6

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 9, 12, 15

Morton v. Mancari, 417 U.S. 535 (1974) ..... *passim*

Nofire v. United States, 164 U.S. 657 (1897) 7

Rice v. Cayetano, 528 U.S. 495 (2000) 7, 8, 9

Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (1999) 9

State v. McClure, 127 Mont. 534, 268 P.2d 629 (1954) 12

United States v. Antelope, 430 U.S. 641 (1977) 6, 7, 8, 9

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) 13

TABLE OF AUTHORITIES – Continued

Page

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998) 15, 16

Worcester v. Georgia, 31 U.S. 515 (1832) 9

CONSTITUTIONS

Confederated Salish and Kootenai Tribes Const. 2

Mont. Const. art. II, § 4 14

U.S. Const. amend. V 6

U.S. Const. amend. XIV, § 1 ..... 4, 11

U.S. Const. amend. XV 7

U.S. Const. art. IV, § 2 11

U.S. Const. art. VI, cl. 2 3

STATUTES

American Indian Religious Freedom Act, 42 U.S.C. §1996 5

Clean Air Act, 42 U.S.C. §7601(d) 5

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136u 5

Federal Land Policy and Management Act of 1976, 43 U.S.C. §1712 5

Federal Water Pollution Control Act, 33 U.S.C. §1377 5

Food, Agriculture, Conservation, and Trade Act of 1990, 7 U.S.C. §5930 5

Indian Crimes Act of 1976, 18 U.S.C. §1151 5

TABLE OF AUTHORITIES – Continued

Page

Indian Major Crimes Act of 1976, 18 U.S.C. §1153 6

Indian Reorganization Act of 1934, 25 U.S.C. §461, et seq. 2

Internal Revenue Code, 26 U.S.C. §38(b)(10) 5

Judiciary and Judicial Procedure, 28 U.S.C. §1353 5

Judiciary and Judicial Procedure, 28 U.S.C. §1360 5

Judiciary and Judicial Procedure, 28 U.S.C. §1362 5

Lacey Act Amendments of 1981, 16 U.S.C. §3372(a)(1) 5

National Housing Act, 12 U.S.C. §1715z-13(a) 5

Reindeer Industry Act, 25 U.S.C. §500 15

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1235(k) 5

Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. §1165 5

TREATIES

Treaty of Hellgate, July 16, 1855, 12 Stat. 975 2

OTHER AUTHORITY

Tribal Government Today, Politics on Montana Indian Reservations, Revised Edition, University of Colorado Press (1998) 10

INTERESTS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES[1]

1. The Controversy

Petitioner Shook intentionally violated a long-standing State of Montana big game hunting regulation that prohibits all persons who are not enrolled members of a particular Indian tribe from hunting big game on that Tribes' Indian Reservation. Shook, who does not claim membership in any Indian tribe, knowingly violated that rational state regulation on the Flathead Indian Reservation, the homeland of the amicus Confederated Salish and Kootenai Tribes ("CSKT"). Pet. App. 3,15.[2] As applied, the Montana regulation prohibits all persons who are not enrolled members of the CSKT from hunting big game on the Flathead Indian Reservation. The state regulation is based on a political distinction: membership in the CSKT. The regulation simply prohibits "hunting by non-tribal members on reservations." Pet. App. 8. Petitioner, who is not an Indian, was treated identically to Indians enrolled in other tribes and to non-Indians who illegally hunt big game under Montana law on the Flathead Indian Reservation.

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[1] Letters from counsel for both parties consenting to this amicus brief are appended to this brief. No counsel for any party authored any part of this brief. No person or entity other than the amicus Tribes made any monetary contribution to the preparation and submission of this brief.

[2] The Petition shall be referred to as "Pet." and the Appendix to the Petition shall be referred to as "Pet. App."

2. The Confederated Salish and Kootenai Tribes

The CSKT are a federally-recognized confederation of American Indian tribes organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §461, et seq. ("IRA"). The Salish and Kootenai people have inhabited western Montana from time immemorial. On July 16, 1855 the CSKT and the United States, acting through Territorial Governor Issac I. Stevens, executed the Treaty of Hellgate, 12 Stat. 975. That Treaty reserved to the CSKT the 1.25 million acre Flathead Indian Reservation as an exclusive Tribal homeland and ceded to the United States millions of acres of CSKT aboriginal territory.

Two issues of federal Indian law are central to this Petition. First, under Article III of the Hellgate Treaty, the CSKT reserved in perpetuity certain hunting and fishing rights and privileges on and off of the Reservation. The Tribes expressly reserved the exclusive right to fish in all streams running through and bordering the Reservation, as well as off-reservation fishing privileges. The Tribes by implication also reserved the right to hunt within the Reservation, as well as the expressly reserved privilege to hunt off of the Reservation. Pet. App. 34.

The second significant federal Indian law issue is the political status of Tribal membership. Prior to the IRA, CSKT enrollment criteria were not codified. Under the CSKT Constitution, approved by the Secretary of Interior under the IRA in 1935, the Tribal government codified enrollment standards. CSKT enrollment criteria have varied over time. For example, for extensive periods of time there was no requirement for any particular blood quantum. Enrollment by adoption into the CSKT has always been an option. Of two persons who are identical

lineal descendants of one person, one may be an enrolled member and the other not. Although the fundamental issue of the Petition is whether membership in an Indian tribe is a race or blood quantum issue, Petitioner failed to establish *any* record on this issue regarding the CSKT or any other tribe in Montana.

3. Relations Between Montana and the CSKT

The State of Montana did not exist at the time of the Hellgate Treaty, is not a signatory to the Treaty, but is nevertheless bound to uphold it under the Supremacy Clause of the U.S. Const. art. VI, cl. 2. Montana has no trust or fiduciary relationship with the CSKT akin to that incumbent on the United States. However, as a matter of Montana and federal law, Montana is under a solemn obligation to follow federal law when state action has the potential to impact federal Treaty-reserved interests.

The CSKT and the State of Montana interact on a government-to-government basis, reaching accommodation when possible and in accordance with federal law. Regulation of hunting and fishing on the Flathead Indian Reservation is one of the issues over which Montana and the CSKT have achieved a lasting resolution; a resolution that is consistent with federal, Montana and CSKT law. *See* Pet. App. 11-13. One manifestation of that resolution is represented by the Montana big game hunting regulation that Shook intentionally violated. That regulation parallels and complements a similar long-standing CSKT law, which is not of record in this matter. Application of both the CSKT and the Montana hunting regulations is based on the political status of the person to be regulated, i.e.,

whether the person to be regulated is an enrolled member of the CSKT.

REASONS TO DENY CERTIORARI

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MONTANA SUPREME COURT AND THE DECISIONS OF THIS COURT

A. THE MONTANA SUPREME COURT DECISION IS IN HARMONY WITH DECISIONS OF THIS COURT HOLDING THAT MEMBERSHIP IN AN INDIAN TRIBE IS A POLITICAL, NOT RACIAL, CLASSIFICATION

When boiled down to the basics, Petitioner argues that a state hunting regulation that treats enrolled members of an Indian tribe differently from all persons who are not enrolled members is race-based and therefore violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. Her challenge is based on a faulty foundation.

It is settled law that membership in an Indian tribe constitutes a political, not racial, classification. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court evaluated a similar challenge to federal Indian preference hiring practices and found that:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly

> designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code [four-volume Title 25, entitled "Indians"] would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.
>
> * * *
>
> Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference.

Morton at 552-553.[3]

The *Morton* Court concluded that preferential treatment is aimed at "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 554. In other words, it is a political, not racial, classification. Under *Morton*, the proper analysis of the challenged Montana regulation is to inquire whether the treatment is "reasonably and directly related to a legitimate, nonracially based goal." *Id.* at 554. The Montana

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[3] Congressional treatment of Tribes as political entities is codified in numerous other Titles of the United States Code as well. *See*, for example, 7 U.S.C. §136u (Tribal enforcement of pesticide control), 7 U.S.C. §5930 (agriculture), 12 U.S.C. §1715z-13(a) (housing), 16 U.S.C. §3372(a)(1) (federal enforcement of Tribal hunting and fishing laws), 18 U.S.C. §1151 ("Indian Country" defined), 18 U.S.C. §1165 (federal offense to violate Tribal hunting and fishing laws), 26 U.S.C. §38(b)(10) (employment credits), 28 U.S.C. §§1353, 1360 and 1362 (Federal Court jurisdiction over various Indian issues), 30 U.S.C. §1235(k) (treating Tribes as states for coal mining activities), 33 U.S.C. §1377 (treating Tribes as states under the Clean Water Act), 42 U.S.C. §1996 (religious freedom), 42 U.S.C. §7601(d) (treating Tribes as states under the Clean Air Act) and 43 U.S.C. §1712 (public land management).

Supreme Court (*Shook*) applied this "rational basis" test and identified several legitimate State interests that the regulation serves, including protection of harvestable herds (Pet. App. 8), compliance with Montana's law and Constitution (*Id.*), and deference to the settlement of *Confederated Salish and Kootenai Tribes v. State of Montana*, 750 F.Supp. 446, 451 (D. Mont. 1990) (enjoining the application of Montana's fishing regulations on portions of the Flathead Reservation). Pet. App. 12-13.

This Court affirmed the *Morton* political analysis in a criminal law context in *United States v. Antelope*, 430 U.S. 641 (1977), a due process and equal protection case arising under the 5th Amendment. In *Antelope*, an Indian was tried criminally under 18 U.S.C. §1153, a statute that only applies to Indians. The analogous state criminal statute did not provide as harsh a penalty as did the federal statute. An Indian defendant challenged his conviction under the federal law, claiming that a non-Indian charged with precisely the same offense would have received a lighter penalty and therefore he was the victim of impermissible invidious racial discrimination. *Id.* at 644. This Court disagreed, finding that:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.
>
> * * *

> Legislation with respect to these 'unique aggregations' has repeatedly been sustained by this Court against claims of unlawful racial discrimination.

Id. at 645 (footnote omitted). As with *Morton*, the *Antelope* Court concluded that differential treatment of Indians and non-Indians "is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.* at 646.[4]

Morton and *Antelope* are Indian law cases. Each expressly found a law like Montana's hunting regulation to be based on a permissible political classification and therefore reviewable under a "rational basis" test. Petitioner invites this Court to ignore the law of the case and look instead to several equal protection cases that do not arise in an Indian law context.

For example, Petitioner asserts that *Rice v. Cayetano*, 528 U.S. 495 (2000), a 15th Amendment voting rights case, should control here. *Rice* found that a Hawaii state statute that treated "native Hawaiians" differently from other people for certain voting purposes violated the 15th Amendment of the Constitution by creating an impermissible race-based voting class. *Id.* at 517. Hawaii sought protection under the *Morton* political classification, but

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[4] The political nature of being an Indian and of Tribal membership is nowhere clearer than in *Nofire v. United States*, 164 U.S. 657 (1897), where a person with no genetic connection to any tribe was treated under Cherokee tribal law and federal criminal law as an Indian because he satisfied the requirements for tribal membership and was therefore legally an Indian.

the *Rice* Court declined to "extend the limited exception [*of Mancari*] to a new and larger dimension." *Id.* at 520. The Court clearly distinguished the historical and legal relationship of the United States and Indian Tribes as governments from its relationship with Hawaiians who lack federally recognized governmental status. In so doing, it focused on Tribal political status and treaty rights. *Rice* at 519-520. Quoting *Morton*, the *Rice* Court expressly reaffirmed the political classification of Indian tribes, noting that "the Court found it important that the preference was not directed towards a racial group consisting of Indians, but rather only to members of federally recognized tribes . . . the preference [was] political rather than racial in nature." *Id.* at 519-520 (citations and quotations omitted). That is the case here, too. If Ms. Shook were enrolled in the CSKT, she would not be prosecuted by Montana. If she were enrolled in another tribe, she would receive the same treatment she received as a non-Indian.

Rice, the very case Petitioner relies on in her attempt to overrule *Morton*, actually confirms that *Morton* is the law of this case. Therefore, the Montana regulation is subject only to a reasonable and rational basis test, not strict scrutiny. *Rice* at 520. That is the standard of review the *Shook* Court employed. Pet. App. 6, 8.

Petitioner also relies upon *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), another case that does not involve Indian law, to implicitly overrule the *Morton* and *Antelope* decisions. The only substantive discussion of the special field of Indian law in *Adarand* occurs in the dissent of Justices Stevens and Ginsburg, where the Justices, citing *Morton*, note that the Federal Government has provided politically-based preference to Indians since the early part of the 19th century. *Adarand* at 244, note 3.

This Court has been loath to find its decisions overruled *sub silentio*. *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (1999). Notably, neither *Adarand* nor *Rice* expressly do so.

While *Adarand* does not overrule *Morton* and *Antelope*, it is instructive on several points. First, it counsels adherence to the doctrine of *stare decisis*. Deviation from *stare decisis* requires "special justification" and is "not a mechanical formula of adherence to the latest decision." *Adarand* at 231. *Stare decisis* applies here because all federal-tribal and all state-tribal relationships are based upon the long-standing decisions of this Court, reaching back to *Worcester v. Georgia*, 31 U.S. 515 (1832) (Tribes as distinct political entities) and forward to *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207-208 (1999) (treaty rights survive statehood and state laws must accommodate them). Furthermore, as discussed in *Morton*, supra, much of the United States Code is based upon the special political status of Indians manifest in the decisions of this Court. The more recent decisions in *Adarand* and *Rice* either affirm or are silent on the last two hundred years of this specialized Indian jurisprudence and legislation. Similarly, Petitioner's reliance on *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (a case that never discusses *Morton*) to implicitly overrule *Morton* on the standard of review fails for two reasons; *stare decisis*, and the principle that overruling by implication is disfavored.

Second, *Adarand* makes clear that a thorough exposition of the facts is essential for a "strict scrutiny" analysis. *Id.* at 236. Petitioner has built *no* factual record on the issue critical to her claim – tribal enrollment standards. Instead, she went to trial on a set of stipulated facts (Pet.

App. 3) that did not address enrollment criteria of the CSKT or any other Tribe in the United States. As a result, this case is not properly before the Court.

In an effort to create a record for this Court after the trial and appeal, Petitioner asserts that "membership for each one of the eleven Indian tribes that reside on reservations in Montana requires a certain blood quantum." Pet. 13. She asserts this without citation to the record of this case, for no such record exists.[5] In an effort to fabricate a record on the alleged racial nature of tribal enrollment, Petitioner asks this Court to visit the web site "for each tribe." Pet. 13, note 5. She then lists sites for six Tribal governments. However, there are seven federally-recognized Tribal governments in Montana with seven different sets of enrollment criteria, all of which have changed over time. Each Tribe treats enrollment differently. The point is, Petitioner simply failed to develop a record to support her claim. She asks for strict scrutiny, but failed to provide any actual evidence for any court to scrutinize. Accordingly, she has failed to satisfy the requirements of Rule 14.1.(f) and (g) of the Rules of the United States Supreme Court.

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[5] A quick review of *Tribal Government Today, Politics on Montana Indian Reservations*, Revised Edition, University of Colorado Press (1998), demonstrates that there are many more than eleven Tribes represented in Montana and there are seven federally-recognized tribal governments.

B. PETITIONER MISAPPREHENDS THE CONSTITUTIONAL STATUS OF A HUNTING PRIVILEGE UNDER MONTANA LAW

Unspoken in Petitioner's claim is the erroneous presumption that hunting big game under Montana law is a Constitutionally-protected right and therefore any regulation that treats her differently from other persons must be subject to strict scrutiny. This Court has held differently. In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), nonresident big game hunters challenged a Montana big game hunting regulation that gave residents of Montana preferential treatment over nonresidents. Treatment under that regulation was based on one single fact, the political distinction between Montana residents and nonresidents. There, as in the instant case, petitioners argued that the Montana regulation violated the Due Process clause of the 14th Amendment of the U.S. Constitution and was therefore subject to a "strict scrutiny" analysis. *Id.* at 373.

The *Baldwin* Court found that there was no Constitutional right to hunt under Montana law. Rather, hunting under Montana law is "'no more than a chance to engage temporarily in a recreational activity in a sister state' and was 'not fundamental.' Thus, it was not protected as a privilege and an immunity under the Constitution's art. IV, § 2." *Id.* at 377. The Court identified the legitimate State interests the regulation served, including securing funding for wildlife management (*Id.* at 374, note 9, 376), wildlife conservation and management (*Id.* at 377), limiting harvest (*Id.*), and concluded that strict scrutiny was not justified. Instead, "[r]ationality is sufficient." *Id.* at 391. These State interests rationally justify disparate treatment of hunting privileges under Montana law based

on the political status of the hunter. The *Baldwin* Court concluded that "the State's efforts [are] rational, and not invidious, and therefore not violative of the Equal Protection Clause." *Id.* at 389.

Baldwin also notes that Montana's big game hunting regulations must take into consideration subjects not expressly written into State law. "The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence." *Id.* at 386; *see also*, Pet. App. 12.

The Montana Supreme Court has long recognized that the Hellgate Treaty is one of the "federally protected interests" acknowledged in *Baldwin*. In *State v. McClure*, 127 Mont. 534, 539-540, 268 P.2d 629, 631 (1954), the Montana Supreme Court found that the Hellgate Treaty:

> [S]olemnly entered into is a contract between two independent nations, in this case, the United States of America and the Flathead Nation, and such a treaty is regarded as a part of the law of the state as much as the state's own laws and Constitution and is effective and binding on state legislatures.

The *Shook* Court noted that the Montana regulation at issue here was crafted to take into consideration Indian treaty rights. Pet. App. 7. As this Court recently confirmed in *Mille Lacs*, supra, treaty-reserved hunting and fishing rights survive, even off-Reservation, in spite of intervening statehood, and state law must accommodate them as a matter of federal law. The *Shook* Court is in line with *Mille Lacs*.

C. THE MONTANA SUPREME COURT PROPERLY UPHELD ITS SOLEMN OBLIGATION TO FOLLOW FEDERAL LAW

Petitioner has fabricated a rule the *Shook* Court did not write. The fabrication has two parts. First, she claims that the *Shook* Court improperly created a "*de facto* trust relationship between Montana and the several Indian tribes" (Pet. at 7), and concludes that Montana has "the same 'trust relationship' with American Indians as does the federal government." Pet. at i. This, Petitioner argues, constitutes a conflict between decisions of the Montana and United States Supreme Court worthy of resolution by this Court. Pet. at 6. Notably, however, Petitioner does not and cannot cite to any such holding in the *Shook* decision, for none exists. Even the case Petitioner relies on for this fabricated argument, *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979), refutes it, noting that "classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and States . . . we find the argument that such classifications are 'suspect' an untenable one." (Citations omitted). Second, Petitioner asserts that her manufactured conflict justifies a different equal protection analysis for the Montana hunting regulation than would be applicable under *Morton* Pet. 7. Notably, however, Petitioner cites no judicial or legislative authority for this part of the fabrication either.

What the Montana Supreme Court actually did was find that the "State of Montana is required to follow this federal precedent [*Morton* and *Antelope*] by the express terms of both our own Constitution and the federal enabling

act establishing Montana as a state." Pet. App. 7. From there the *Shook* Court concluded that:

> [F]ederal Indian law regarding the rights of Indians is binding on the state. Therefore, the state equal protection guarantee under Article II, Section 4 [of the Montana Constitution], must allow for state classifications based on *tribal membership* if those classifications can rationally be tied to the fulfillment of the unique federal, and consequent state, obligation toward Indians.

Pet. App. 7 (emphasis added).

Rather than conflicting with this Court, the *Shook* Court properly upheld the supremacy of federal law, a necessity under the Supremacy Clause of the United States Constitution. The *Shook* Court correctly concluded that it was obligated to adhere to federal law when dealing with Indian issues. This is consistent with *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), another case addressing limitations on state authority over treaty-reserved rights. The *Arizona* Court concluded that "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." *Id.* at 571. That is exactly what the *Shook* Court did. This does not constitute the creation of a *de facto* trust relationship. Consequently, because there is no conflict between the United States Supreme Court and the Montana Supreme Court on this point there is no basis for review by this Court.

II. THERE IS NO CONFLICT BETWEEN THE MONTANA SUPREME COURT DECISION AND THE NINTH CIRCUIT COURT OF APPEALS DECISION IN *WILLIAMS v. BABBITT*

Petitioner claims that the *Shook* decision is in conflict with *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998). Pet. 21-24. *Williams* involved a *Chevron* analysis of an agency interpretation of the Reindeer Industry Act, 25 U.S.C. §500.[6] As interpreted, Alaska Natives, rather than persons who may simply have been born in Alaska, were afforded preference in raising reindeer as a commercial crop. Even though the Act did not explicitly limit the right to Natives, it appears that a combination of factual and procedural constraints and federal regulations resulted in an effective Native monopoly over commercial production of the introduced species. *Id.* at 659, 660-661. Non-Natives challenged the Act as violative of their equal protection rights. *Id.* at 659.

Far from constituting a conflict between the courts, *Williams* distinguished treatment of Alaska Natives under the Reindeer Act from treatment of Indian treaty-reserved hunting and fishing rights, finding that, "[u]nlike raising livestock, however, hunting and fishing wild game is an integral and time-honored part of native subsistence culture." *Id.* at 664. *Accord*, *Mille Lacs,* supra. Supporting the *Morton* political treatment of Indians, the *Williams* Court provided numerous examples of Congressional treatment of Indians as a political, not racial, classification. *Id.* at 664,

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[6] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (deference to agency interpretation of statutes and regulations).

footnote 6. There is no conflict between the *Shook* decision and *Williams*.

CONCLUSION

The Montana Supreme Court decision is not in conflict with the decisions of this Court or of a United States Court of Appeals. The Writ of Certiorari should be denied.

Respectfully submitted,

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